

83-851

No. _____

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IN THE
Supreme Court of the United States
OCTOBER TERM 1983

SOUTH STREET SEAPORT MUSEUM,
as Owner of the Bark PEKING,

Petitioner,

—v.—

CRAIG McCARTHY,

Respondent,

—and—

THE STATE INSURANCE FUND and NORTHBROOK EXCESS AND
SURPLUS INSURANCE COMPANY,

Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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QUESTIONS PRESENTED FOR REVIEW

1. Can the Bark PEKING which is on exhibit afloat alongside Petitioner's pier, which has not sailed under its own power in 50 years, which cannot be steered, which is not required to be inspected by the United States Coast Guard, and which is not intended to be returned to navigation, be deemed a "vessel" so as to subject Petitioner to a suit for damages under § 905(b) of the Longshoremen's and Harbor Worker's Compensation Act in addition to its workmen's compensation obligation?
2. By giving the broadest possible meaning to the term "vessel" for purposes of permitting a liability action against Petitioner-employer under § 905(b) of the Act, did the Court of Appeals misinterpret the scope of this Court's remand of this case as well as other decisions of this Court which stress the objective of the 1972 Amendments to the LHWCA of reducing litigation in favor of compensation payments?
3. Was the decision of the Court of Appeals in error, disruptive of the uniformity concept of the maritime law, and in conflict with decisions of this Court, other Courts of Appeals, as well as its own prior decision, in rejecting the traditional "in navigation", "in commerce", and Jones Act tests of a "vessel" for purposes of § 905(b) of the LHWCA in favor of a vague and litigation inspiring "residual capacity", "hypothetically plausible possibility" or "non-nautical" test of a vessel?

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 716 F.2d 130 (2d Cir. 1983). The decision of this Court remanding the case to the Court of Appeals is reported at ____ U.S. ___, 103 S.Ct. 809, 74 L.Ed. 2d 1010 (1983). The first opinion of the Court of Appeals is reported at 676 F.2d 42 (1982). The opinion of the District Court is not officially reported, but is reported at 1981 A.M.C. 2995 (S.D.N.Y. 1981). All opinions are reprinted in the Appendix to this Petition.

JURISDICTION

The opinion and decision of the Court of Appeals for the Second Circuit sought to be reviewed was entered on August 23, 1983. No Petition for rehearing was filed in the Court of Appeals. This Petition for Writ of Certiorari is filed within 90 days of August 23, 1983. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c).

STATUTORY PROVISIONS INVOLVED¹

Title 33 U.S.C. § 902(3) provides:

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Title 33 U.S.C. § 902(21) provides:

The term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this Act suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charterer or bare boat charterer, master, officer, or crew member.

Title 33 U.S.C. § 903(a) provides:

Coverage

Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any

1 Emphasis shows 1972 amendments.

adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; . . . ”

Title 33 U.S.C. § 905(b) provides:

(b) In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.

Title 1 U.S.C. § 3 provides:

The word vessel includes every description of watercraft or other artificial contrivance, used, or capable of being used, as a means of transportation on water.

Title 46 U.S.C. § 713 provides:

Definitions, schedule, and tables

In the construction of title 53 of the Revised Statutes, every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the "master" thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a "seaman"; and the term "vessel" shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river, to which the provisions of such title may be applicable, and the term "owner" shall be taken and understood to comprehend all the several persons, if more than one, to whom the vessel shall belong.

STATEMENT OF THE CASE

Jurisdiction arises in the District Court under 28 U.S.C. § 1333 where a maritime tort is alleged to have occurred over navigable matters.

The opinion of the District Court, described in the first Court of Appeals opinion as "well reasoned," 676 F.2d at 45, App. p. 19a, and in the second Court of Appeals opinion,² 716 F.2d at 132, App. p. 3a, as "excellent," described the Bark PEKING as follows:

The [B]ark PEKING, launched in 1911 at Hamburg, Germany, is a four-masted steel-hulled 377-foot vessel weighing 2,883 net tons. Between 1974 and 1976 it was purchased for its present owners, defendant South Street Seaport Museum; towed across the Atlantic to New York; berthed for repairs on Staten Island; and ultimately, towed to South Street Seaport. It there serves as a museum and is occasionally rented out to private parties as an entertainment hall. Although it remains capable of

2 Both by the same panel and author.

being towed, its rudder has been welded in one position and it has not put to sea under its own motive power since the 1930's. It is not subject to inspection by the United States Coast Guard and has not been so inspected. Its present owners affirm that they do not intend ever to return it to active navigation, and nothing in the record before us suggests a contrary intent.

The Court adopted Judge Knapp's description which it said was supported by the record and which appears in both opinions. *See App. p. 18a and pp. 3a-4a.*

It might be added that on the motion for summary judgment in the District Court, the uncontested affidavit of the Museum's historian stated among other criteria recited by the District Court and the Court of Appeals on two occasions, that when towed from England to New York, in July of 1975, PEKING was "treated as a floating hulk by both English and United States customs officials". (*App. p. 30a*).

As appears in the two opinions, respondent, a "self-styled, historical iron-worker and shiprigger" employed by the Museum, was injured while painting the main mast and spars of the PEKING.³

As summarized in the second opinion, 716 F.2d at 132, *App. p. 4a*, the Court had on the first occasion affirmed the District Court's grant of summary judgment in favor of the Museum on grounds that respondent was not engaged in maritime employment at the time of his injury, that he was not therefore an "employee" within the meaning of 33 U.S.C. § 902(3), and since "not an 'employee' for purposes of the LHWCA, he could not recover damages under its provisions." The Court went on to state that in *Director, Office of Workers' Compensation Programs, United States Department of Labor v. Perini North River Associates*, 459 U.S. ___, 103 S.Ct. 634, 74

³ (*App. pp. 3a and 18a*). At the time according to the first opinion, 676 F.2d 42, 44, *App. p. 17a*, it was "berthed at the Museum". In the second opinion the same Court states without support from the record that PEKING "rides at anchor in the harbor." 716 F.2d at 136, *App. p. 13a*.

L.Ed. 2d 465 (1983)⁴ this Court had held that workers required to perform their employment duties upon navigable waters were engaged in "maritime employment" under the above section of the LHWCA, irrespective of whether their activities were traditionally maritime or not. As a result of the *Perini* decision, this Court on January 24, 1983 remanded the within action to the Court of Appeals for reconsideration in light of that case. On the same day this Court denied petitions for certiorari in seven other cases extending over a two year period.⁵

In its first opinion the Court of Appeals isolated two issues: 1) Whether or not respondent was an employee in maritime employment at the time of his injury and 2) Whether or not he was injured as a result of the "negligence of a vessel" within the meaning of 33 U.S.C. § 905(b). See 676 F.2d at 45, App. p. 19a. While the "vessel" issue was said to be left open, the Court nevertheless came to grips with it by holding that Respondent had "not satisfied the status test" of maritime employment because he was not working aboard a "vessel" at the time of his injury. In evaluating the status of PEKING, the Court noted, 676 F.2d at 45, App. p. 21a, that its rudder has been welded in one position, that it had not sailed since the 1930's and that there was no intention by Petitioner to return her to active navigation. The Court concluded by stating:

4 Hereinafter "Perini."

5 The seven cases embrace, among others, such diverse employments as a night watchman who boarded a vessel in port for repairs in the performance of his duties, *Robert W. Kirk & Associates v. Holcomb*, 655 F.2d 589 (5th Cir. 1981), cert. denied, ____ U.S. ___, 103 S. Ct. 814, 74 L.Ed. 2d 1013 (1983); a construction worker engaged in building a draw bridge over navigable waters, *B.F. Diamond Constr. Co. v. LeMelle*, 674 F.2d 296 (4th Cir. 1982), cert. denied, ____ U.S. ___, 103 S. Ct. 830, 74 L.Ed. 2d 1024 (1983); a sales manager for custom built recreational and racing boats who only devoted some of his time to maritime duties, *Sanger Boats Inc. v. Schwabenland*, 683 F.2d 309 (9th Cir. 1982), cert. denied, ____ U.S. ___, 103 S. Ct., 814 74 L.Ed. 2d 1013 (1983), and an airplane pilot spotting fish in waters off the Gulf Coast, *Zapata-Haynie Corp. v. Ward* 684 F.2d 1114 (5th Cir. 1982), cert. denied, ____ U.S. ___, 103 S. Ct. 815, 74 L.Ed 1013 (1983).

The LHWCA was intended to apply only to workers employed in activities related to vessels which *at least have the potential to engage in navigation or in commerce on navigable waters. The PEKING no longer has that potential.* (emphasis added)

Without anything intervening except this Court's decision in *Perini, supra*, which undeniably mandates that Respondent is entitled to workmen's compensation benefits under the LHWCA rather than under the New York Workmen's Compensation Act, the Court of Appeals, continuing to adopt the same findings of Judge Knapp which noted that PEKING has not sailed under its own power for half a century, now maintains (716 F.2d at 135, App. p. 12a):

A craft need not be actually engaged in navigation or commerce in order to come within the definition of 'vessel'. The question is one of residual capacity.

The Court further notes that as long as PEKING "rides at anchor in the harbor, ready and able to head for the open seas, even in tow, she remains a vessel." The difference in the two opinions between no longer having the "potential" to be in navigation or commerce and a "residual capacity" to engage in navigation or commerce could hardly be more striking, and the change finds no justification in this Court's remand.

Despite the inconsistency between the two opinions, Petitioner did not move for reargument in the Court of Appeals on these varying interpretations of what is a "vessel." Petitioner deemed it unlikely that the same Court, having changed its mind once, would return to its original reasoning without further instructions from this Court. If Petitioner's position as set forth herein be correct, and if review is not granted at this time, it will have to await a trial on the merits, an appeal on the merits to the Court of Appeals and an additional Petition for Writ of Certiorari to this Court before that position may be vindicated.

Meanwhile, as the law of the Second Circuit, the decision can have an impact not only on Petitioner's "vessels" but,

within this Circuit, on such similar museum exhibits as, for example, at Mystic Seaport in Connecticut and the former aircraft carrier INTREPID, berthed in the Hudson River in Manhattan, in addition to other maritime museums without the Circuit. Moreover, not only in the Second Circuit but elsewhere at shipyards throughout the country, it will encourage litigation at any stage of the building of a "vessel" and even render such structures as floating restaurants liable to suits for damages by their employees, in addition to claims for compensation under the LHWCA.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The Court of Appeals misinterpreted the scope of this Court's remand of this case, as well as other decisions of this Court which stress the objective of the 1972 Amendments to the LHWCA of reducing litigation in favor of compensation payments, when it gave the broadest possible meaning to the term "vessel" for purposes of permitting a liability action against petitioner-employer under § 905(b) of the Act.

Throughout its second opinion the Court tends to find itself bound, even with seeming reluctance, to employ the most expansive definition of a "vessel" that can be mustered, casting aside even the liberally construed Jones Act, 46 U.S.C. § 541-713, interpretation, 716 F.2d at 134 n.2, App. p. 8a n.2, in favor of one that is "broadly inclusive," "perhaps even the hypothetically plausible". Thus it found that there had emerged a "non-nautical concept of a vessel" that need not be actually engaged in navigation or commerce but only have a "residual capacity" to do so. The Court concluded that much as it would like to formulate a definition which would capture the seagoing essence of a vessel, it felt constrained, because PEKING "still rests upon navigable waters and may be returned to the sea, if only in tow", to give the most "expansive scope" to that term.

While clearly Respondent is now entitled to workmen's compensation benefits under the LHWCA, it is submitted that

the Court of Appeals has gone too far and applied the philosophy of broadest possible *compensation* coverage to the construction of a *liability* claim without any instruction or even indication from this Court that it should do so.

The LHWCA is recognized as preeminently a Compensation Act, not a Liability Act such as the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, or the Jones Act, 46 U.S.C. § 688 *et seq.*, and when it is construed liberally to achieve its purposes, those ends are intended which promote the prompt, adequate and uncomplicated payment of compensation to the injured worker. *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 612 (1981).

The statistics cited by Justice Stevens in his dissenting opinion in *Perini, supra*, 74 L.Ed. 2d at 489-90, which note that some 270,000 longshoremen and ship repairmen are covered by the Act, that in addition there are 300,000 employees of private employers within the District of Columbia and another 200,000 in defense bases and outer continental shelf projects, further illustrate the point. Thus, it is not unreasonable to conclude that while all are entitled to workmen's compensation benefits, a majority will have no occasion to sue a "vessel" or take advantage of the one exception to the exclusiveness of remedy provision found in § 905(a) to sue their employers under the *Reed v. The YAKA*, 373 U.S. 410 (1963) concept, as more recently discussed by this Court in *Jones & Laughlin Steel Corporation v. Pfeifer*, ____ U.S. ___, 103 S.Ct. 2541, 76 L.Ed. 2d 768 (1983).

While giving an expansive construction to compensation coverage in accordance with the purposes of the Act, this Court has moved in the opposite direction when litigation rather than compensation is at issue. Thus there is no justification in the *Perini* case for the Court of Appeals to have afforded a broad "compensation interpretation" to what is a "vessel" under § 905(b) of the Act.

Bearing in mind that *Perini* instructs us that the Act is to be interpreted in terms of "statutory construction and legislative intent", this Court has already derived interpretations from the

overall Congressional intent to curtail litigation, those that were not actually spelled out in the statute. The Court of Appeals, finding no "precise guidelines" in § 902(21) and with the legislative history "not helpful", applied the broadest possible definition to a "vessel". Similarly, this Court in *Scindia Steam Navigation Co. Ltd. v. De Los Santos*, 451 U.S. 156, 165 (1981) observed that § 905(b) did not specify what acts or omissions of the vessel would constitute "negligence" and said that the legislative history did not furnish "sure guidance for construing § 905(b)." By way of contrast with the Court of Appeals, however, this Court was able to formulate a negligence standard of care, consistent with the Congressional purpose of reducing litigation, one for example, that did away with any obligation of the shipowner to inspect or supervise the stevedoring operation.

While the Court of Appeals nods in the direction of this Court's decision in *Bloomer v. Liberty Mutual Ins. Co.*, 445 U.S. 74 (1980), it fails to acknowledge the underlying philosophy of that decision and its reliance on the Congressional intent of reducing litigation to insure that employers would have sufficient funds to pay the additional compensation rate. Such an appreciation should be all the more noteworthy in a situation where the employer is also said to be the "vessel owner" and would have an exposure both for compensation and liability, where in the more typical three-party situation, the employer would no longer be liable for indemnification, having only a compensation obligation, while the non-employing vessel owner would have a liability exposure but none for compensation. In accordance with the principle of having employer resources available for compensation payments, this Court ruled in *Bloomer* that the employer was entitled to full reimbursement for its compensation payments from its employee's recovery of damages against a vessel owner, unreduced by any cost of that litigation. Here again, this Court gave voice to the underlying purposes of the Act although the result reached did not appear in so many words in any statutory language. Indeed, the very language of the House

Report⁶ quoted on page 83 of the *Bloomer* decision, even militates against the preservation of the *Reed v. The YAKA* concept. Quoting from the Senate Report, this Court noted "the social costs of these lawsuits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in a real increase in actual benefits for injured workers." This Court therefore concluded in *Bloomer, supra*, 445 U.S. at 85-86, that "It would be ironic indeed" if the amendments designed to eliminate the employer's third-party liability were so interpreted as to give birth to a new liability, namely a charge against the compensation payments made for the employee's legal expenses in an action against the vessel owner.

Might not this Court therefore paraphrase its own language (p. 86) in *Bloomer*, to find application here:

We are unwilling to attribute to Congress an intention to allow creation of [an expansive definition of a "vessel"] irreconcilable with its general desire to reduce litigation and to ensure conservation of the legal expenses of stevedores and their insurers.

Nor is the *Bloomer* decision an isolated one. On the same topic of reducing litigation in favor of payment of compensation benefits, this Court had said earlier in *Edmonds v. Compagnie General Transatlantique*, 443 U.S. 256, 261 n.9 (1979), that while generally compensation does not compensate for an employee's entire loss "the 1972 Amendments to the Act, however, make a determined effort to narrow the gap between the harm suffered and the benefits payable."

In citing *Bloomer*, this Court observed in *Rodriguez v. Compass Shipping Co., Ltd., supra*, 451 U.S. at 616:

6 As the House Report notes, the consequence was that a "stevedore-employer is indirectly liable for damage to an injured longshoreman who utilizes the technique of suing the vessel, with the result that much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs." H.R. Rep. No. 92-1441, p. 5 (1972); see S. Rep. No. 92-1125, p. 9 (1972).

Moreover those changes remind us that one of the purposes of the Act is to minimize the need for litigation as a means of providing compensation for injured workmen.

Noting that the level of benefits was substantially increased, this Court again noted (p. 616) the likelihood "that the statutory compensation recoverable without proof of fault would be adequate." It went on to comment that the amendments were intended to increase "the relative importance of statutory awards as the favored method of compensation."

Most recently this Court stated in *Morrison-Knudsen Construction Co. v. Director, Office of Workers' Compensation Program*, ____ U.S. ____, 103 S.Ct. 2045, 76 L.Ed. 2d 194, 203 (1983):

. . . the Act was not a simple remedial statute intended for the benefit of the workers. Rather, it was designed to strike a balance between the concerns of the longshoremen and the harborworkers on the one hand and their employers on the other. Employers relinquished their defenses to tort actions in exchange for limited and predictable liability. Employees accept the limited recovery because they receive prompt relief without the expense, uncertainty and delay that tort actions entail.

It is submitted therefore that the Court of Appeals takes an altogether incorrect approach, one out of step with all of the decisions of the Court on the subject, when it maintains, 716 F.2d at 136, App. p. 13a, that § 905(b) and the legislative history "eince no intention to limit the scope of the employee's negligence remedy against the vessel by placing a restrictive construction on the term 'vessel' ". This is not the point. Given the stated purposes of the Act, as set forth repeatedly by this Court, it is rather whether the Court was correct in utilizing the most expansive interpretation of the word "vessel".

It is therefore submitted that the Court of Appeals misinterpreted the scope of the remand of this case by this Court, that it construed the *Bloomer* case and the other cited decisions of

this Court having to do with the conservation of employer resources and the curtailment of litigation faultily and that this Court in the exercise of its powers of supervision over the Courts of Appeals should grant the Petition and resolve this issue which now has become the law of the Second Circuit.

2. Whether the test of a "vessel" is measured by the language of 1 U.S.C. § 3 or that generally applicable to seamen, 46 U.S.C. § 713, it would seem that the rejection of the "in navigation" or "in commerce test" and the adoption of a "non-nautical" or "residual capacity" test by the Court of Appeals is in conflict with the traditional view laid down by this Court in innumerable decisions and followed in overwhelming number by the Courts of Appeals. This is especially true in cases under the LHWCA where the definition of a "vessel" is construed similarly, if not required to be entirely in line with what is a "vessel" for Jones Act purposes, as will be demonstrated *infra* (2(b)).

Curiously the Court of Appeals, not without reason, cites no decisions of this Court in support of its "residual capacity", "non-nautical" or "hypothetically plausible" thesis of what is a "vessel".

a. Historically and even apart from the Jones Act and the LHWCA PEKING would not be considered a "vessel" under the decisions of this Court.

The Court of Appeals observed in the first opinion, 676 F.2d at 44, App. p. 18a, that PEKING has not put to sea under its own power since the 1930's and while it would prefer to "slip her moorings, ease into the harbor and head for the open seas with the seagulls in her wake", that "Sadly, she is fated not to do so." Indeed, it "no longer has that potential" to engage in navigation or in commerce on navigable waters. 676 F.2d at 46, App. p. 21a.

In the second opinion, it was again noted that PEKING "has not put to sea under her own power for half a century." 716 F.2d at 132, App. p. 4a. Moreover, the Court agreed, 716 F.2d at 135, App. p. 11a, that "No rational person would suggest

that the PEKING is in a position gracefully to 'slip her moorings, ease into the harbor and head for the open seas'"

While personifying PEKING in picturesque language in both opinions, the Court fails to take into consideration the difference between "her once-proud bearing" as a vessel, one that sailed the high seas under her own power, earning her way by carrying cargo and passengers and her present state, where if moved at all PEKING is reduced to being pulled in tow. It is perhaps at this point and while considering vulnerability that we should look to an eighty year old decision of this Court which, judging by the frequency with which it is cited has, despite its longevity, survived as an authority longer than PEKING has fulfilled its original role as a vessel.

In *The Robert W. Parsons*, 191 U.S. 17 (1903) the issue was whether there was state or admiralty jurisdiction to enforce a lien for repairs on a canal boat, which at the time was engaged in navigating the Erie Canal in New York. The boat was propelled by horse power in the primitive sense of the term. In holding admiralty jurisdiction controlled, this Court said (p. 30):

*

In fact, neither size, form, equipment, nor means of propulsion are determinative factors upon the question of jurisdiction, which regards *only the purpose for which the craft was constructed and the business in which it is engaged.* (emphasis added)

Ruled out as vessels were such items (p. 30) as "the floating drydock, the floating wharf, the ferry bridge hinged or chained to a wharf, the sailors Bethel moored to a wharf, . . . and a gas float moored as a beacon" Rejecting the argument that maritime jurisdiction did not obtain because it was drawn by horses along the Erie Canal, this Court said (p. 31):

So long as the vessel is engaged in commerce and navigation it is difficult to see how the jurisdiction of admiralty is affected by its means of propulsion, which may vary in the course of the same voyage or with new discoveries made in the art of navigation.

More important for us today than the means of propulsion are the two criteria listed by the Court and their application to PEKING. Certainly the Court of Appeals would agree that "the purpose for which PEKING was constructed" is not being fulfilled if it requires being towed to be moved, and the "business in which it is engaged" as a museum exhibit is certainly not navigation or commerce. It may also be seen that this Court employed the present tense and not any "residual capacity" nor "hypothetically plausible" capacity for transportation. In short, the test should be what is PEKING now, not what PEKING was fifty years ago.

In this connection, the Court may also take notice that it has never been the contention of Petitioner that the variety of floating craft cited by the Court of Appeals are not vessels or that self-propulsion is a requisite to being a vessel. Thus, limited use vessels such as floating cranes,⁷ derricks and ordinary barges,⁸ houseboats⁹ and pleasure boats,¹⁰ all meet the *The Robert W. Parsons* criteria and are irrelevant to an evaluation of PEKING. Thus, if a houseboat without propulsion is towed from one point to another as the owners seek a change in place of floating habitation, it is fulfilling its original purpose and it is precisely how it was intended to be moved.

The Robert W. Parsons drew upon the earlier decision of *Cope v. Vallette Dry Dock Company*, 119 U.S. 625 (1887),

7 *Bongiovanni v. N.V. Stoomvaart-Maats "Oostzee"*, 458 F. Supp. 602 (S.D.N.Y. 1978); *Salgado v. M.J. Rudolph Corp.*, 514 F.2d 750 (2d Cir. 1975).

8 *Richardson v. Norfolk Shipbuilding and Drydock Corp.*, 479 F. Supp. 259 (E.D. Va. 1979), *aff'd on other grounds*, 621 F.2d 633 (4th Cir. 1980) [derrick barge]; and *Burks v. American River Transportation Co.*, 679 F.2d 69 (5th Cir. 1982); *Norton v. Warner Co.*, 321 U.S. 565 (1944) [barges].

9 *Hudson Harbor 79 Street Boat Basin Inc. v. Sea Casa*, 469 F. Supp. 987 (S.D.N.Y. 1979); *Miami River Boat Yard Inc. v. 60' Houseboat*, 390 F.2d 596 (5th Cir. 1968).

10 *Jones v. One Fifty Foot Gulfstar Motor Sailing Yacht*, 625 F.2d 44 (5th Cir. 1980).

which held that there was no maritime jurisdiction over a salvage claim for drydock since "not used for the purpose of navigation, . . ." stating as well:

The fact that it floats on the water does not make it a ship or vessel, and no structure that is not a ship or vessel is a subject of salvage.

This Court cited as an example:

A sailor's floating bethel or meeting house, moored to a wharf, and kept in place by a paling of surrounding piles, is in the same category.

Similarly, in 1920 this Court in *Thames Towboat Co. v. The Schooner "Francis McDonald"*, 254 U.S. 245, 246, ruled that a claim for supplies furnished and repairs made to a schooner which had been launched but not yet completed was not within admiralty and maritime jurisdiction despite the fact that the hull was capable of being towed and was indeed towed from Groton to New London, Connecticut. This Court denied maritime jurisdiction commenting that while the schooner had been launched and was water-borne it was "not sufficiently advanced to discharge the functions for which intended, . . ." Commenting that contracts for the construction of a vessel are not deemed to be within admiralty jurisdiction, this Court said this was so because "It is said that in no proper sense can they be regarded as *directly* and *immediately* connected with navigation or commerce by water." (emphasis supplied).

In 1926 this Court in *Evansville v. Bowling Green Packet Co.*, 271 U.S. 19, held that a wharf boat which sank in the Ohio River was not permitted limitation of liability. Reviewing the predecessor statute of 1 U.S.C. § 3, it held that a wharf boat employed to transfer freight between steamboats and land and from one steamboat to another, and although capable of being towed, was still not a vessel for purposes of seeking limitation of liability. This Court noted (p. 21) that it was "not subject to government inspection as are vessels operated on navigable waters." (p. 22) "It was not practically capable of

being used as means of transportation." "It did not encounter perils of navigation to which craft used for transportation are exposed."

In *Norton v. Warner Co.*, 321 U.S. 565, 571 (1944), cited by the Court of Appeals for the adoption of the 1 U.S.C. § 3 definition of a "vessel", this Court insisted on a contemporary capability for navigation and transportation, not a "residual capacity", stating (p. 57):

A barge is a vessel within the meaning of the Act even when it has no motive power of its own, since it is a means of transportation on water. (emphasis supplied).

More recently this Court held in *Foremost Insurance Company v. Richardson*, 457 U.S. 668 (1982), that two pleasure boats in collision were within admiralty jurisdiction although there was no commercial aspect to their navigation, citing 1 U.S.C. § 3. This Court reasoned (p. 674):

The federal interest in protecting maritime commerce cannot be adequately served if federal jurisdiction is restricted to those individuals actually engaged in commercial maritime activity. The interest can be fully vindicated only if *all* operators of vessels on navigable waters are subject to uniform rules of conduct.

* * * *

(p. 675):

The potential disruptive impact of a collision between boats on navigable waters, when coupled with the traditional concern that *admiralty law holds for navigation*, compels the conclusion that this collision between two pleasure boats on navigable waters *has a significant relationship with maritime commerce*. (emphasis added)

b. The rejection by the Court of Appeals of the Jones Act test of a vessel for purposes of § 905(b) of the LHWCA is in conflict with the decisions of this Court and the Courts of Appeals.

In citing a potpourri of authorities under a variety of statutes, it is clear that the Court of Appeals did not hew to the admonition contained in footnote 29 of this Court's opinion in *Perini, supra*, 74 L.Ed. 2d at 482 n.29, where among other things this Court cautioned:

Although the term 'maritime' occurs both in 28 U.S.C. § 1333(1) and in § 2(3) of the Act these are two different statutes 'each with different legislative histories and jurisprudential interpretations over the course of decades'. *Boudreaux v. American Workover Inc.*, 680 F.2d 1035, 1050 (CA5 1982).

The Court of Appeals, in searching for a definition of the term "vessel" as found in § 905(b) of the LHWCA stated, 716 F.2d at 135, App. p. 8a, that Congress did not provide a definition "different from the generally acknowledged one" found in 1 U.S.C. § 3. Therefore, it presumed that Congress intended "to adopt this commonly-used term." In so doing it expressly discarded cases decided under the Jones Act, 46 U.S.C. §§ 541-713, which "have looked to a different test in determining what is a vessel for Jones Act purposes." 716 F.2d at 132 n.2, App. p. 8a n.2. As will be developed, this is essentially the "in navigation"¹¹ criterion.

In rejecting the Jones Act analysis, the Court below has overlooked that part of the original definition of employee appearing in §§ 2(3) and 3(a)(1) of the Act which excludes "a master or member of a crew of *any vessel*," (emphasis added) as well as the historic interplay between the Jones Act and the LHWCA found in so many of the decisions of this Court. As to this, the Court of Appeals for the Fifth Circuit, as recently

¹¹ The statutory definition of a "vessel" most closely associated with the Jones Act is found in 46 U.S.C. § 713 (cited *supra*), which specifies a vessel to be "in navigation".

as August 15, 1983, in *Parks v. Dowell Division of Dow*, 712 F.2d 154, 158, has held that a Jones Act "seaman" and a "crew member" "excluded from the Longshoremen's Act are one and the same." Since the Jones Act definition of a "vessel" is pertinent in determining who are "excluded" from LHWCA coverage, it would hardly make for an orderly interpretation of the same statute to have a different definition of a "vessel" to determine who are "included."

It is not altogether surprising that the Jones Act and the LHWCA definition of a vessel should be read harmoniously. As expressed by this Court speaking through Mr. Justice Cardozo in *Warner v. Goltra*, 293 U.S. 154, 156 (1934), it was thought at one time and despite their lack of resemblance to seamen, that longshoremen were indeed entitled to sue under the Jones Act. This was prior to the enactment of the LHWCA. This Court provided guidance for the future when it then said (p. 159):

The scheme of legislation becomes symmetrical and consistent when the Merchant Marine Act of 1920 is read in the light of another act in pari materia, the Longshoremen's and Harbor Workers' Compensation Act (U.S.C. title 33 §§ 901 *et seq.*) adopted in [March 4] 1927. This Act expressly excludes from its 'coverage' a 'master or member of a crew of any vessel'. §903.

The exclusion was inserted because seamen preferred to remain outside of the compensation provisions. *South Chicago Coal and Dock Co. v. Bassett*, 309 U.S. 251, 257 (1940). Thus, a distinction was made between those who perform a certain service aboard the vessel as distinguished from those who were "naturally and primarily onboard to aid in her navigation." *Id.*, at 260.

So closely linked are the LHWCA and Jones Act that the Court of Appeals in employing the 1 U.S.C. § 3 definition of a vessel, set forth in *Norton v. Warner, supra*, 321 U.S. at 571 n.4, nevertheless overlooked the holding in the case which ruled that a bargeman working on a vessel in navigation and which served as a "means of transportation on water" was

actually covered under the Jones Act and not entitled to claim under the LHWCA, as the Court below suggested. The same intertwined relationship between the Jones Act and the LHWCA is evident in this Court's decision in *Swanson v. Marra Brothers Inc.*, 328 U.S. 1, 7 (1946).

It is also difficult to follow how the Court of Appeals could reject the Jones Act criteria of a "vessel" when for so many years (1946-1972) both seamen and longshoremen mutually enjoyed the same warranty of seaworthiness as to a vessel under *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 99 (1946).

The criteria for a "vessel" has continued to remain the same for both seamen and longshoremen. In *Desper v. Starred Rock Ferry Co.*, 342 U.S. 187, 191 (1951), again contrary to the "residual capacity" rationale espoused by the Court below, this Court ruled, as to seamen:

The distinct nature of the work is emphasized by the fact that there was no vessel engaged in navigation at the time of the decedent's death. All had been 'laid up for the winter'.

There being no vessel, decedent became only (p. 191) a "probable navigator" and this Court held that the Jones Act "does not cover probable or expectant seamen but seamen in being."

On the longshoremen or harbor-worker side of the coin, this Court ruled in *West v. United States*, 361 U.S. 118 (1959), that no warranty of seaworthiness existed in favor of a repairman employed by an independent contractor and engaged in reactivating a previously laid-up vessel. Although in the mothball fleet at Norfolk, Virginia, it was towed to Philadelphia with a skeleton officer crew aboard, and where work commenced. The repair specifications indicated (p. 121) that the vessel was not seaworthy for a voyage, and that major repairs "would be necessary before one could be undertaken." The warranty of seaworthiness was deemed inapplicable because as this Court said (p. 122), "The MARY AUSTIN, as anyone could see was not in maritime service."

Two years later this Court decided *Roper v. United States*, 368 U.S. 20, 21, (1961), an action by a longshoreman. The District Court had dismissed the suit because "since the ship in fact was not in navigation there was no warranty of seaworthiness." As with PEKING, her rudder was secured, along with other equipment and the ship "lost her Coast Guard safety certificate as well as her license to operate, both of which were requisites to a vessel in navigation." Again as would be with PEKING, this Court noted (p. 21), "Indeed the trial court found that 'admittedly' reactivation of the ship would have required a major overhaul." The vessel was thereafter used for grain storage, but "not reactivated for navigation nor use for transportation purposes," After being towed to loading facilities and filled with grain, it remained for two years until towed back to the grain elevator for unloading. No activation repairs were made, nor was any effort made to obtain a license to operate as a vessel in navigation, and none was issued. The fact that the SS HARRY LANE was twice towed had no impact on this Court's decision. It was simply not a vessel in navigation. The Court said (p. 24), "This movement was by tug without assistance from the ship's motive or directional equipment which, indeed, was not in the least useable." The Court then concluded that since the "SS HARRY LANE was not a vessel in navigation, it follows that there was no warranty of the ship's seaworthiness." Significantly, this Court then went on to comment (p. 24):

This limitation is analogous to that applied in libels under the Jones Act, where it has long been held that recovery is precluded if the ship involved is not a vessel in navigation.

When Congress amended the LHWCA in 1972, it did not, as the Court of Appeals agrees, furnish a new definition of a "vessel" and certainly not one different than in § 2(3) or § 3(a)(1) which were partially amended to broaden compensation coverage for "maritime employment" but did not alter the exclusion for crew members on "any vessel".

The seamen exclusion was indeed described by this Court in *Perini, supra*, 74 L.Ed. 2d at 474, as the first of five conditions a worker had to overcome to obtain coverage under the original LHWCA.¹²

Just as this Court has ruled in *Perini* that the 1972 Amendments by their silence did not alter the maritime status of workers injured over navigable waters, so too, the historical definition and interpretation of the word "vessel" appearing in §§ 2(3) and 3(a)(1) should also remain unchanged by a Congressional stillness on the subject, especially where other portions of the same sections were amended. If the word "vessel" has already been defined and interpreted in §§ 2(3) and 3(a)(1), should it be done any differently in §§ 2(21) and 5(b) which were added in 1972 without qualification?

Various Courts of Appeals have also considered the interaction between the Jones Act, and the LHWCA. In *Hawn v. American Steamship Co.*, 107 F.2d 999 (2d Cir. 1939), a vessel was withdrawn from navigation for storage of soybeans and was without her classification. Plaintiff was therefore deemed not "a member of a crew of the ship at the time of his injury." He was limited to compensation under the LHWCA. In *Nelson v. Greene Line Steamers Inc.*, 255 F.2d 31 (6th Cir.), cert. denied, 358 U.S. 867 (1958), a Mississippi River excursion vessel was tied up for the winter, therefore not in navigation, and one working aboard on repairs was held not a seaman. In *Hill v. B.F. Diamond*, 311 F.2d 789 (4th Cir. 1962), the Court stated as a general proposition (p. 792):

Even ships, beyond question vessels in navigation when in service, are not vessels in navigation when undergoing major construction work to fit them for navigation, or after decommissioning when they are being prepared for storage.

12 "First, the worker had to satisfy the 'negative' definition of 'employee' contained in § 2(3) of the 1927 Act in that he could not be a 'master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.' "

Similarly, for purposes of *Reed v. The YAKA, supra*, the Court of Appeals for the Fifth Circuit in *Chahoc v. Hunt Shipyard*, 431 F.2d 576 (5th Cir. 1970), cited by the Court below, while acknowledging that a floating drydock might under some circumstances be a vessel when actually under tow, ruled as a matter of law that it was not "while moored to the bank and operated as drydock." Nor would a substantially incomplete "vessel" qualify, as found in *Garcia v. American Marine Corporation*, 432 F.2d 6 (5th Cir. 1971).¹³ See also *Keller v. Dravo Corporation*, 441 F.2d 1239 (5th Cir. 1971), cert. denied, 404 U.S. 1017 (1972), which held that a floating drydock is not a vessel at least "when it is moored and in use as a drydock" and that the barge inside the drydock was not a vessel because undergoing substantial repairs and out of navigation.

In *Cook v. Belden Concrete Products Inc.*, 472 F.2d 999 (5th Cir.), cert. denied, 414 U.S. 868 (1973), recovery was sought alternatively under the Jones Act and under *Reed v. The YAKA, supra*. Involved was a floating construction platform (flat-deck barge) moored in navigable waters. Citing, among other authorities, *The Robert W. Parsons, supra*, the Court noted the "determinative factors upon the question of jurisdiction [are] the purpose for which the craft was constructed and the business in which it is engaged." Pertinent to our case, is the language of the Fifth Circuit in footnote 5, p. 1001, which observes that while the construction platform was capable of being towed and while under tow in navigable waters might, as with a dry dock, "for a limited time become a subject of maritime jurisdiction . . . , "neither the *capability for such movement* nor the fact that the dock has been *moved through navigable waters in the past* establishes that the dock, while secured to the bank and in service is a vessel." (emphasis supplied). The Court again noted on p. 1002 that if actually engaged in navigation "at the time of appellant's injury", it

13 Cf., *Lundy v. Litton Systems Inc.*, 624 F.2d 590 (5th Cir. 1980), cert. denied, 450 U.S. 913 (1981), involving a vessel, moored to a dock, in its final stages of outfitting preparatory to sea trials, 97% complete with a crew aboard, one of whom was charged with negligence.

might be classified as a vessel but not while "engaged in its primary function as a stationary construction platform."

The *Cook* case in the Fifth Circuit was then closely followed by *Powers v. Bethlehem Steel Corp.* in the First Circuit, 477 F.2d 643, *cert. denied*, 414 U.S. 856 (1973). There the Court held that for purposes of the Jones Act or the LHWCA, a work raft which had been previously moved or towed around Boston harbor was not a vessel (p. 647):

The purpose and business of the present craft was not the transportation of passengers, cargo or equipment from place to place across navigable waters. It was tied to the pier or its pilings virtually all of the time.

The Court went on to say that it "may well be" (p. 648) that when "in actual navigation—such as when, unattached to land, it is under tow for an appreciable distance over navigable water—it will temporarily acquire a vessel's status."

By way of contrast, *Salgado v. M.G. Rudolph Corp., supra*, 514 F.2d 750 (2d Cir. 1975) also concerned with the mutually exclusive question of whether the injured party was a seaman or a longshoreman, while rejecting seaman's status to a worker without a more or less permanent connection with the vessel, held that a floating crane performing its function (p. 756) of transporting goods over water was indeed a vessel. The injured employee (p. 757) "was doing work which was the primary purpose of the crane, i.e. loading ships."

As late as 1978 the Court of Appeals for the Fifth Circuit, in *Blanchard v. Engine and Gas Compressor Services, Inc.*, 575 F.2d 1140, again cited (p. 1142) the rule in *The Robert W. Parsons, supra*, and its own earlier decision in *Cook v. Belden Concrete Products, supra*, for the propositions that buildings erected on permanently sunken barges are not Jones Act vessels, since (p. 1143) "Gulf moreover did not intend to move these structures on a regular basis . . ." "they did not carry navigation lights or equipment, lifeboats or any lifesaving gear nor were they registered with the Coast Guard as vessels." The Court went on to say (p. 1143) "In fact, Gulf emphasizes that

they could be moved, if at all, only under the most favorable weather conditions." It concluded as it had in its prior opinion that "[m]ere flotation on water does not constitute a structure, a 'vessel'"

In *Watkins v. Pentzien Inc.*, 660 F.2d 604 (5th Cir. 1981), *cert. denied*, 456 U.S. 944 (1982), two barges secured together, used as a construction platform and capable of being (p. 607) "towed from place to place by a tug", were held not vessels for Jones Act purposes with the Court also saying:

Our decision that the two-barge structure in which Watkins was injured was not a vessel in navigation also disposes of his claim under the general maritime law.

Citing its decision in *Cook v. Belden Concrete Products*, *supra*, the same Court updated the rule of *The Robert W. Parsons*, *supra*, saying "The critical inquiry is 'the purpose for which the craft was constructed and the business in which it is engaged'."

In *Barger v. Petroleum Helicopters Inc.*, 692 F.2d 337 (1982), *cert. denied*, ____ U.S. ___, 103 S.Ct. 2430, 77 L.Ed. 2d 1316 (1983), the Court of Appeals for the Fifth Circuit concluded that the estate of a deceased helicopter pilot could not claim a Jones Act remedy since a helicopter was not a vessel. It also said in footnote 5, p. 341, again imposing the same test for a vessel under the Jones Act as under § 905(b) of the LHWCA, "However § 905(b) is simply irrelevant here unless a helicopter is a 'vessel'. We have concluded that it is not." Even the dissent qualified the helicopter as a "vessel" only because (p. 343):

It is maritime because of the nature of the work it regularly performed—the transportation of persons and property.

In *Fox v. Taylor Diving & Salvage Co.*, 694 F.2d 1349 (1983), the Fifth Circuit repeated (p. 1354) the oft cited criteria that the so-called "vessel must be 'designed for navigation and commerce,' " and, "At the very least such a vessel must be in

use for navigation or direct commerce *at the time of the accident.*" (emphasis supplied).

A District Court decision applying the definition of a "vessel" correlative under the Jones Act and the LHWCA is *Jefferson v. SS BONNY TIDE*, 281 F. Supp. 884, 885 (E.D. La. 1968). It was held that a "vessel" launched and riding on navigable waters was still "unprepared for and incapable of navigation *at the time of plaintiff's injury.*" (emphasis supplied). The Court said that since the BONNY TIDE was not a vessel, there was no cause of action under the Jones Act or for unseaworthiness, and moreover:

Consequently, *Reed v. The YAKA*, 373 U.S. 410 . . . , does not apply to permit the plaintiff longshoreman to circumvent the exclusiveness of his compensation remedy under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*

A "uniform test", according to *Richardson v. Norfolk Shipbuilding and Drydock Corp.*, 479 F. Supp. 259 (E.D. Va. 1979), *aff'd on other grounds*, 621 F.2d 633 (4th Cir. 1980), has been employed "applicable to both the Jones Act and the LHWCA, to determine an individual's status as a harbor worker or a crewman/seaman." Should not a uniform test also be applied as to what is a "vessel" under each? *Mayfield v. Wall Shipyard Inc.*, 510 F. Supp. 605, 607 (E.D. La. 1981) answers the question in the affirmative.

Fleming v. Port Allen Marine Service Inc., 552 F. Supp. 27 (M.D. La. 1982), citing such authority as *The Robert W. Parsons, supra*, and *Cook v. Belden Concrete Products Inc., supra*, ruled that a work platform was not a vessel under § 905(b) of the LHWCA. The Court reached its decision against an indistinguishable backdrop of both Jones Act and § 905(b) cases. It repeated that "mere flotation on water" was not enough (p. 30) nor was the fact that it was moved around the yard by a tug boat. *Id.*, at 28. The Court concluded since not "primarily designed to serve in navigation," it was not a vessel.

It is perhaps curious that the analysis of the Court of Appeals places little, if any, emphasis on the decisions of this

Court in general or those of other Courts under § 905(b) and it expressly puts aside the companion Jones Act evaluation of a "vessel". With the exception of *Luna v. STAR OF INDIA*, 356 F. Supp. 59 (S.D. Cal. 1973), it seems to rely on maritime lien cases for its "hypothetically plausible", "residual capacity" and "non-nautical" concepts. At the same time, it entirely overlooks the teaching of the enduring *The Robert W. Parsons* decision of this Court, *supra*, itself a lien case, and followed in so many other authorities construing a vessel alternatively under the Jones Act or the LHWCA even down to the decision in *Fleming v. Port Allen Marine Service Inc.*, *supra*, of less than a year ago.

If the lien cases afford a broader definition of vessel, as suggested in *New England Fish Co. v. The Barge or Vessel SONYA*, 332 F. Supp. 463, 468 n.4 (D. Alaska 1971),¹⁴ it may well be under the rationale that liens are most often incurred by vessels under 46 U.S.C. § 971 while they are not in active service or navigation. See also *In Re Queen Ltd.*, 361 F. Supp. 1009 (E.D. Pa. 1973). Cf., *Pleason v. Gulfport Shipbuilding Corp.*, 221 F.2d 621 (5th Cir. 1955), (a stationary shrimp processing, freezing and storage plant—held a vessel for lien purposes under 46 U.S.C. § 671) with *Garcia v. Universal Seafoods Ltd.*, 459 F. Supp. 463 (W.D. Wash. 1978) (floating seafood processor held not a vessel under Jones Act).

Farrell Ocean Services Inc. v. United States, 681 F.2d 91 (1st Cir. 1982), involved the susceptibility to maritime liens under 46 U.S.C. § 671 of "four vessels" loaded and transported on a barge. While not functioning as such at the moment, the Court said (p. 93), "These four vessels certainly were fully capable of operating as vessels." This of course is much more than the "residual capacity" or "hypothetically plausible" test of the Court below.

14 However, in a lien claim for crew wages, the same Court employed a test that it said had been frequently examined by Courts considering the Jones Act and its relationship to the LHWCA (p. 467). It cited 46 U.S.C. § 713, and in deciding that no "vessel" existed for purposes of establishing a lien for crew wages noted "The owners had no intention of ever using her again as a means of transportation over the water . . ." (p. 468)

M/V MARIFAX v. McCrory, 391 F.2d 909 (5th Cir. 1968), was also a lien case, but here the vessel had actually been restored to service after 15 years layup and had made a voyage before being taken into a shipyard for repairs. The Court said it was "not navigably impotent at the time of the appellees repair work and certainly she was capable of being used in navigation." Other lien cases cited by the Court below are *The Showboat*, 47 F.2d 286 (D. Mass. 1930), and *Hudson Harbor 79th Street Boat Basin Inc. v. Sea Casa*, 469 F. Supp. 987 (S.D.N.Y. 1979).

Luna v. STAR OF INDIA, *supra*, 356 F. Supp. at 65, acknowledges that it was not applying the Jones Act test¹⁵ of a "vessel" but "a broader definition" to determine whether or not admiralty jurisdiction existed as to a visitor aboard a museum "vessel". The Court was obviously concerned with the impact of this Court's then recent decision in *Executive Jet Aviation Inc. v. City of Cleveland*, 409 U.S. 249 (1972) and the whole status/situs concept of maritime jurisdiction. Clearly it was not deciding an action under the LHWCA.

We may be reminded once again of the cautionary language, cited earlier, of this Court in *Perini, supra*, 74 L.Ed. 2d at 482 n.29, with respect to employing the same word, in several different statutes, "Although the term 'maritime' occurs in 25 U.S.C. § 1333(1) and in § 2(3) of the Act these are two different statutes 'each with different legislative histories and jurisprudential interpretations over the course of decades.' "

15 With more justification than the Court below which followed the *Luna* decision without commenting on the difference.

CONCLUSION

For the reasons set forth herein, Petitioner believes that a resolution of the definition of a "vessel" under the Longshoremen's and Harbor Workers' Compensation Act is required and therefore prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit entered on August 23, 1983.

Respectfully submitted,

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APPENDIX

**Court of Appeals Decision Reversing District Court Following
Remand From This Court**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1411—August Term, 1982

Docket No. 81-7587

(Submitted April 21, 1983 Decided August 23, 1983)

CRAIG McCARTHY,

Plaintiff-Appellant,

—v.—

THE BARK PEKING, her sails, equipment, appurtenances,
etc., and SOUTH STREET SEAPORT MUSEUM,

Third Party Plaintiff-Appellee,

THE STATE INSURANCE FUND and
NORTHBROOK EXCESS AND SURPLUS INSURANCE,

Third Party Defendants-Appellees.

Before:

TIMBERS, KEARSE and CARDAMONE,
Circuit Judges.

On remand from the Supreme Court for further consideration of our prior decision, 676 F.2d 42 (2 Cir. 1982), in light of that Court's subsequent decision.

Affirmed in part; vacated and remanded in part.

RICHARD L. DAHLEN, Edwin F. Lambert, Jr., and Dahlen & Gatewood, Boston, Mass., together with Zock, Petrie, Reid & Curtin, New York, N.Y., submitted a brief *for plaintiff-appellant McCarthy*.

FRANCIS X. BYRN, William J. Troy III, and Haight, Gardner, Poor & Havens, New York, N.Y., submitted a brief *for third party plaintiff-appellee South Street Seaport Museum*.

ALAN G. CHOATE, Joseph F. Moore, Jr., Wayne W. Suojanen, and Pepper, Hamilton & Scheetz, Philadelphia, Pa., together with Mark O. Kasanin, Richard C. Brautigam, and McCutchen, Doyle, Brown & Enersen, San Francisco, Cal., submitted a brief *amici curiae for National Maritime Historical Society and National Maritime Museum Association*.

TIMBERS, *Circuit Judge*:

Following our prior decision in this case on April 12, 1982, 676 F.2d 42 (2 Cir. 1982), appellant petitioned for

certiorari with respect to a part of our decision. On January 24, 1983, the Supreme Court entered the following order (51 U.S.L.W. 3552):

"82-53 McCarthy v. Bark Peking. The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of Director, Office of Workers' Compensation Programs, United States Department of Labor v. Perini North River Associates, 459 U.S. — (1983)."

On March 3, 1983, upon receipt of a certified copy of the judgment of the Supreme Court, an order was entered by our Court vacating our judgment of April 12, 1982. On March 31, 1983, we entered a further order inviting counsel to file supplemental briefs addressed to the issue with respect to which the case had been remanded to us for further consideration. Such briefs have been filed. The case is now ripe for decision by us on the remand from the Supreme Court.

For the reasons stated below, we affirm our prior decision in part, and vacate and remand in part.

I.

We assume familiarity with the facts of this case as summarized in our prior opinion, 676 F.2d at 44-45, as well as in the excellent opinion of the district court of June 3, 1981.

In short, McCarthy was injured on December 12, 1979 while painting the upper mainmast and spars of the Bark Peking, a museum vessel on exhibit as one of the artifacts at the South Street Seaport Museum. Her rudder is

welded in one position and she has not put to sea under her own power for half a century. McCarthy commenced an action in the Southern District of New York on June 9, 1980, seeking, in Count I, damages against the vessel itself and against its owner, the Museum, under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1976 & Supp. V 1981) (LHWCA or Act). In Count II, he sought damages against the Museum because of an allegedly wrongful discharge pursuant to § 11(c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c)(1) (1976) (OSHA).

In affirming the district court's order granting summary judgment in favor of defendants, we held, with respect to Count I, that McCarthy was not engaged in "maritime employment" at the time of his injury; that he therefore was not an "employee" within the meaning of § 2(3) of the Act, 33 U.S.C. § 902(3) (1976); and that, since he was not an "employee" for purposes of the LHWCA, he could not recover damages under its provisions. 676 F.2d at 45-46.

With respect to Count II, we affirmed the district court's order granting summary judgment in favor of the Museum on the ground that McCarthy had failed to file a timely complaint with the Secretary of Labor, as required by § 11(c)(2) of OSHA, and therefore had not exhausted his administrative remedies. 676 F.2d at 46-47. Judge Kearse, concurring in the judgment that McCarthy could not recover under Count II, placed her concurrence on the ground that there is no implied right of action under § 11(c), as the Sixth Circuit had held in *Taylor v. Brighton Corp.*, 616 F.2d 156 (6 Cir. 1980).

II.

As for Count II outlined above, McCarthy did not include our decision with respect thereto in his petition for certiorari. Our holding on that count, set forth in Part IV of our opinion of April 12, 1982, stands undisturbed. We therefore confirm that part of our prior opinion and the judgment entered thereon.

III.

We turn next to Count I, as to which the Supreme Court remanded the case to us for reconsideration.

(A)

In *Director, Office of Workers' Compensation Programs, United States Dept. of Labor v. Perini North River Associates*, 459 U.S. __ (1983), 51 U.S.L.W. 4074 (U.S. Jan. 11, 1983) (No. 81-897), the Court held that a construction worker injured on a cargo barge—where he was working to build a foundation for a sewage treatment plant—was engaged in “maritime employment”. With respect to the status requirement of § 902(3), the Court held that “[w]e consider those employees to be ‘engaged in maritime employment’ not simply because they are injured in a historically maritime locale, but because they are required to perform their employment duties upon navigable waters.” 51 U.S.L.W. at 4081.

Having reconsidered our prior decision in the light of *Director*, as the Court has ordered us to do, we now hold that McCarthy was a covered employee for purposes of the LHWCA, and that the Bark Peking is a “vessel” to the extent that McCarthy properly may allege the “negli-

gence of a vessel" and thus bring his action for damages under 33 U.S.C. § 905(b) (1976).

We conclude that McCarthy now must be considered to have been engaged in "maritime employment" at the time he was injured on the Bark Peking on December 12, 1979. He was "injured on the actual navigable waters in the course of his employment on those waters. . . ." *Director*, 51 U.S.L.W. at 4081. Under this latest Supreme Court decision, no more is required to qualify McCarthy as a statutory "employee".

(B)

That, however, does not end our inquiry under Count I.

Since we hold that McCarthy was a statutory employee and thus was covered under the Act, we must now consider a second issue which we did not have the occasion to reach in our prior decision, namely, whether McCarthy was injured as the result of "the negligence of a vessel" within the meaning of § 905(b), so that his statutory remedies are not limited by § 905(a), the exclusivity provision of the Act.¹

¹ Under the Act, an injured employee is entitled to prescribed compensation from his employer. §§ 907-909. He may not bring an action against his employer for damages beyond the compensation remedy. § 905(a). An injured employee, however, may bring an action for damages against the vessel and her owner if his injury was caused by "the negligence of a vessel". § 905(b). If the owner also is the employer, the action for damages will still lie notwithstanding the purported exclusivity of the compensation remedy. *Reed v. S.S. Yaka*, 373 U.S. 410 (1963).

This current state of the law is the result of the 1972 amendments to the LHWCA, Pub. L. 92-576, *codified at* 33 U.S.C. §§ 901-950 (1976), they having replaced the employee's action for unseaworthiness—which in effect was a nautical rule of strict liability, *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 95 (1946)—with an action against the vessel for negligence. At the same time, Congress eliminated the owner's indemnity action against the longshore employer. § 905(b). The net result of the amendments was to limit the remedies of a statutory

The Museum and intervenors National Maritime Historical Society and National Maritime Museum Association now ground their argument entirely on the claim that the Bark Peking, museum piece that she is, does not qualify as a "vessel" for purposes of § 905(b), and therefore McCarthy could not have been injured as the result of "the negligence of a vessel". We hold that this is an unsupported narrowing of the term "vessel" as it is used in the Act.

The 1972 amendments to the Act, note 1 *supra*, which provided that a statutory employee may bring an action for damages against a vessel for injuries caused by "the negligence of a vessel", § 905(b), added to the statute in § 902(21) only a circular definition of the term "vessel":

"The term vessel means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member."

Obviously this definition does not provide precise guidance as to what is included within the term "vessel". The legislative history similarly is not helpful. Those courts which have considered the term subsequent to the 1972 amendments, however, have held it to be broadly inclusive.

For example, in *Burks v. American River Transportation Co.*, 679 F.2d 69 (5 Cir. 1982), the court held that non-propelled river barges, in use as transports, were

employee to two: compensation from the employer regardless of fault, and an action for damages against the vessel where the employee's injury was caused by "the negligence of a vessel".

"vessels" within the meaning of § 905(b). Such varying seafaring entities as a 97% completed destroyer, *Lundy v. Litton Systems, Inc.*, 624 F.2d 590 (5 Cir. 1980), *cert. denied*, 450 U.S. 913 (1981), a yard derrick barge, *Richardson v. Norfolk Shipbuilding & Drydock Corp.*, 479 F. Supp. 259 (E.D. Va. 1979), *aff'd on other grounds*, 621 F.2d 633 (4 Cir. 1980), and a floating crane, *Bongiovanni v. N.V. Stoomvaart-Matts "Oostzee"*, 458 F. Supp. 602 (S.D.N.Y. 1978), also have been held to be "vessels" within the meaning of § 905(b).

We do not believe that our canvass should be confined to those cases decided subsequent to the 1972 amendments. Courts which have construed the term "vessel", under the LHWCA as well as in analogous contexts, almost uniformly have adopted the definition set forth in the General Provisions of the United States Code, 1 U.S.C. § 3 (1976) ("section 3"), referred to below. *E.g.*, *Norton v. Warner Co.*, 321 U.S. 565, 571 n.4 (1943) (LHWCA); *Burks v. American River Transportation Co.*, *supra*, 679 F.2d at 75 (LHWCA); *Bongiovanni v. N.V. Stoomvaart-Matts "Oostzee"*, *supra*, 458 F. Supp. at 609 (LHWCA). Since Congress, in its use of the term "vessel" in §§ 902(21) and 905(b), did not provide a definition different from the generally acknowledged one found in section 3, we may presume, as other courts have, that it intended to adopt this commonly-used term. *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947, 952-53 (7 Cir.), *aff'd*, 442 U.S. 940 (1979).²

² In contrast, cases decided under the Jones Act, 46 U.S.C. §§ 541-713 (1976), have looked to a different test in determining what is a vessel for Jones Act purposes. *E.g.*, *Blanchard v. Engine & Gas Compressor Services*, 575 F.2d 1140, 1142 (5 Cir. 1978); *Hicks v. Ocean Drilling and Exploration Co.*, 512 F.2d 817, 823 (5 Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976).

Section 3 defines "vessel" to include "every description of watercraft or other artificial contrivance *used, or capable of being used, as a means of transportation on water.*" 1 U.S.C. § 3 (1976) (emphasis added). Pursuant to the axiom that "vessels" must be at least capable of use as a means of transportation on water, courts uncertain of a particular craft's place in nautical taxonomy have drawn distinctions based on the presence or absence of this residual capacity. *Compare, e.g., Keller v. Dravo*, 441 F.2d 1239, 1243-44 (5 Cir.), *cert. denied*, 404 U.S. 1017 (1971) (floating drydock attached to dock and used as construction platform held not to be a vessel under LHWCA as a matter of law); *Chahoc v. Hunt Shipyard*, 431 F.2d 576, 577 (5 Cir. 1970) (same), with *Burks v. American River Transportation Co., supra*, 679 F.2d at 71, 75 (non-propelled river barge held to be a vessel).

At the same time, however, virtually any capacity for use as seagoing transportation—perhaps even the hypothetically plausible possibility—has sufficed to lend the dignity of "vessel" status to a host of seemingly unlikely craft. *E.g., Hudson Harbor 79th Street Boat Basin, Inc. v. Sea Casa*, 469 F. Supp. 987, 989 (S.D.N.Y. 1979) (houseboat capable of being towed from one location to another viewed as analogous to a "dumb barge" and held therefore to be a section 3 vessel for purposes of admiralty and maritime jurisdiction); *Miami River Boat Yard, Inc. v. 60' Houseboat*, 390 F.2d 596, 597 (5 Cir. 1968) (powerless houseboat held to be a "vessel"); *M/V Marifax v. McCrory*, 391 F.2d 909, 910 (5 Cir. 1968) (decommissioned Navy ship, 15 years in mothballs, held to be a "vessel" while in preparation for return to service as civilian ship); *Luna v. Star of India*, 356 F. Supp. 59, 63-66 (S.D. Cal. 1973) (historic ship in use as part of a maritime museum held to be a "vessel" because she was

"capable of engaging in maritime transportation, if only as a towed craft"); *The Showboat*, 47 F.2d 286, 287 (D. Mass. 1930) (retired schooner converted into a restaurant and dance hall remained a "vessel" under section 3).

In a variety of contexts, adding for illustrative purposes some of the cases we have already discussed, courts have found the following to be "vessels": *Salgado v. M. J. Rudolph Corp.*, 514 F.2d 750, 755-56 (2 Cir. 1975) (floating crane); *Bongiovanni v. N.V. Stoomvaart-Matts "Oostzee"*, *supra*, 458 F. Supp. at 610 (same); *In Re Queen Ltd.*, 361 F. Supp. 1009, 1010-11 (E.D. Pa. 1973) (propellerless boat awaiting transfer to a permanent berth); *Lundy v. Litton Systems, Inc.*, *supra*, 624 F.2d at 592 (uncompleted destroyer);³ *Jones v. One Fifty Foot Gulfstar*, 625 F.2d 44, 47 n.2 (5 Cir. 1980) (ocean-tested yacht still in construction on dry land). Even more surprising, a Navy vessel converted into a stationary shrimp-processing plant was held to be a section 3 vessel in *Pleason v. Gulfport Shipbuilding Corporation*, 221 F.2d 621, 623 (5 Cir. 1955).⁴ As Judge John Brown of the Fifth

³ But see *Garcia v. American Marine Corp.*, 432 F.2d 6, 7 (5 Cir. 1970) (substantially uncompleted ship held not to be a vessel); *Jefferson v. SS Bonny Tide*, 281 F. Supp. 884 (E.D. La. 1968) (same).

⁴ The court in *Pleason*, 221 F.2d at 673, gave a graphic description of the condition of the vessel:

"A prior owner . . . had decided to scrap her, and had sold a substantial amount of her tackle and apparel. At the time she was brought in for the above-mentioned repairs, she was in substantially the following condition: her propellers and propeller shafts had been removed; she had no crew; none of her machinery was in operation; she had no light, heat, or power in operation; her main engines had been completely removed; all of her steering apparatus, with the exception of the rudder, had been removed and sold; her superstructure and masts were intact; her navigation lights were in place, though not operable; her compartmentation, including cargo holds, was intact. . . .

After the services . . . were performed, she was towed across the Gulf of Mexico from Port Arthur to Port Isabel without crew or

Circuit stated the section 3 "vessel" anachronism: "[n]o doubt the three men in a tub would also fit within our definition [of "vessel" under § 3], and one could probably make a convincing case for Jonah inside the whale." *Burks v. American River Transportation Co., supra*, 679 F.2d at 75.⁵

In light of the non-nautical concept of a vessel which has emerged in the case law, we are constrained to hold that the *Peking* remains a vessel despite her age and current use. No rational person would suggest that the *Peking* is in a position gracefully to "slip her moorings, ease into the harbor and head for the open seas. . . ." *McCarthy v. The Bark Peking, supra*, 676 F.2d at 44. On the other hand, the district court found that the *Peking* was capable of being towed, welded rudder notwithstanding.⁶ Less than ten years ago, following her purchase by

motive power or operative steering device of any kind. 'At Port Isabel she was moored to a dock by steel cables and ropes and engaged in receiving shrimp from trawlers for processing, freezing, storing and resale in commerce, in the same manner as a similar plant would operate on land. Shrimp were delivered on board in baskets just as they are unloaded on a dock or wharf. Telephone and electric lines from land were connected . . . although she had her own power system. The location of the vessel was changed once when she was towed down the ship channel and again secured, in the same manner, in a stationary position.' "

⁵ Indeed, a recent generation of law clerks, in their nefarious account of a voyage on a 22 foot sloop off the rock-bound coast of Maine, undoubtedly would be surprised to learn that they had been on a section 3 vessel and that they were covered by the LHWCA. Wald and Ford, "*The Death Voyage Of The Ensign*" (1980) (unpublished).

⁶ The district court described the *Peking* as follows—a description which we adopted in our prior opinion (676 F.2d at 44):

"The [B]ark PEKING, launched in 1911 at Hamburg, Germany, is a four-masted steel-hulled 377-foot vessel weighing 2,883 net tons. Between 1974 and 1976 it was purchased for its present owners, defendant South Street Seaport Museum; towed across the Atlantic to New York; berthed for repairs on Staten Island; and, ultimately, towed to South Street Seaport. It there serves as a museum and is

her present owner, the Peking underwent a stormy voyage—albeit in tow—across the Atlantic to her berth at the South Street Seaport Museum. The Museum concededly is engaged in the restoration of the ship to at least a semblance of her once-proud bearing—if only, as it states, for illustrative purposes.

This brings the Peking into the category of many other vessels with similarly limited capacities. A craft need not be actually engaged in navigation or commerce in order to come within the definition of “vessel”. The question is one of residual capacity. *Farrell Ocean Services, Inc. v. United States*, 631 F.2d 91, 93 (1 Cir. 1982); *M/V Marifax v. McCrory*, *supra*, 391 F.2d at 910. In *Marifax* the vessel had been in mothballs for 15 years. In *Luna v. Star of India*, *supra*, 356 F. Supp. at 63-66, the vessel was an historic three masted bark on display, like the Peking, as a museum ship. The court, interpreting section 3, held that as a museum ship she remained a vessel despite her long absence from the sea and her artifact status. *See also The Showboat*, *supra*, 47 F.2d at 286-87.

The houseboat in *Hudson Harbor 79th Street Boat Basin v. Sea Casa*, *supra*, 469 F. Supp. at 989, was no more likely to slip her moorings and head for the open seas than is the Peking. But the court in that case found, for the purpose of establishing its admiralty and maritime jurisdiction, that “it is clear that a floating houseboat capable of being towed from one location to another is a vessel within the admiralty and maritime jurisdiction of this Court.”

occasionally rented out to private parties as an entertainment hall. Although it remains capable of being towed, its rudder has been welded in one position and it has not put out to sea since the 1930's. It is not subject to inspection by the United States Coast Guard and has not been so inspected. Its present owners affirm that they do not intend ever to return it to active navigation, and nothing in the record before us suggests a contrary intent.”

The Museum and the intervenors, asserting that the Peking cannot be considered a vessel, rest their argument on the legislative history of § 905(b) which was added by the 1972 amendments. They claim that this section was intended to limit actions for damages. To the extent that this argument relies on the provision of § 905(b) which eliminates both the employee's action for unseaworthiness and the shipowner's action for indemnity from a negligent employer, the argument is correct. Section 905(b) was intended to "reduce litigation, immunize stevedores and their insurers from liability in third party actions, and assure conservation of stevedore resources for compensation awards to longshoremen." *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74, 84 (1981). But this section of the statute and the accompanying legislative history evince no intention to limit the scope of the employee's negligence remedy against the vessel by placing a restrictive construction on the term "vessel". See generally H.R. Rep. No. 92-1441, 92nd Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 4698.

The Peking may be fated to ride at anchor for the rest of her days. Her rudder is welded in place. Her owner has no intention of slipping her moorings and taking her again to the open seas, with the seagulls in her wake. But she retains at least this much of the dignity of her former venerable station: as long as she rides at anchor in the harbor, ready and able to head for the open seas, even in tow, she remains a vessel. Much as we should like to formulate a definition of "vessel" that captures the essence of the seagoing definiendum, no Platonic form suggests itself; hence we are left with the halting efforts of the common law. The Peking, despite her moorings and her role as a museum piece, still rests upon navigable

waters and may be returned to the sea, if only in tow. Paraphrasing the late Mr. Justice Frankfurter in a different context, we "cannot keep the word of promise to [her] ear . . . and break it to [her] hope."⁷

In light of the expansive scope that has been given to the section 3 definition of "vessel", we hold that the *Peking* is a vessel for purposes of the LHWCA, and that McCarthy may bring his action under § 905(b) to recover damages for the "negligence of a vessel".

Affirmed in part, and vacated and remanded in part for further proceedings in the district court consistent with this opinion. No costs in this Court on the instant remand.

⁷ *Griffin v. Illinois*, 351 U.S. 12, 24 (1956) (Frankfurter, J., concurring).

**Court of Appeals Decision
Affirming District Court**

**UNITED STATES COURT OF APPEALS
SECOND CIRCUIT**

Argued Dec. 14, 1981

Decided April 12, 1982

No. 445, Docket 81-7587

CRAIG McCARTHY,

Plaintiff-Appellant,

—v.—

THE BARK PEKING, her sails, equipment, appurtenances, etc.,
and SOUTH STREET SEAPORT MUSEUM,

Third Party Plaintiff-Appellee,

THE STATE INSURANCE FUND and
NORTHBROOK EXCESS AND SURPLUS INSURANCE,

Third Party Defendants-Appellees.

On appeal from a summary judgment entered on motion of defendant South Street Seaport Museum, pursuant to Fed.R.Civ.P. 54(b), in the Southern District of New York, Whitman Knapp, District Judge, dismissing an action in which plaintiff, an employee of the Museum, sought damages and other relief as the result of his fall from a bosun's chair suspended by a gantline on the Bark Peking while the latter was berthed at the Museum, the Court of Appeals, Timbers, Circuit Judge, held: (1) that plaintiff was not engaged in "maritime employment" within meaning of the Longshore-

men's and Harbor Workers' Compensation Act since vessel no longer had potential to engage in navigation or commerce on navigable waters, and (2) that since plaintiff had not exhausted administrative remedies available to him, there was no need to reach question whether he had private right of action under the Occupational Safety and Health Act.

Affirmed.

KEARSE, *Circuit Judge*, filed a concurring opinion.

RICHARD L. DAHLEN, Boston, Mass. (Edwin F. Lambert, Jr., New York City, Dahlen & Gatewood, Boston, Mass., and Zock, Petrie, Reid & Curtin, New York City, on the brief), for plaintiff-appellant.

FRANCIS X. BYRN, New York City (William J. Troy III, and Haight, Gardner, Poor & Havens, New York City, on the brief), for third party plaintiff-appellee South Street Seaport Museum.

RAYMOND C. GREEN and SUSAN R. PETITO, New York City, filed a brief for third party defendant The State Insurance Fund.

ALAN G. CHOATE, Joseph F. Moore, Jr., Wayne W. Suojanen, and Pepper, Hamilton & Scheetz, Philadelphia, Pa., and Mark O. Kasanin, Richard C. Brautigam, and McCutchen, Doyle, Brown & Enersen, San Francisco, Cal., filed a brief *amici curiae* for National Maritime Historical Society and National Maritime Museum Assn.

Before:

TIMBERS, KEARSE and CARDAMONE,
Circuit Judges.

TIMBERS, Circuit Judge:

On this appeal from a summary judgment entered on motion of defendant South Street Seaport Museum, pursuant to Fed.R.Civ.P. 54(b),¹ in the Southern District of New York, Whitman Knapp, *District Judge*, dismissing an action in which plaintiff, an employee of the Museum, sought damages and other relief as the result of his fall from a bosun's chair suspended by a gantline on the Bark Peking while the latter was berthed at the Museum, the questions presented are (1) whether the district court correctly ruled that plaintiff was not engaged in "maritime employment" so as to bring him within the definition of an employee in § 2(3) of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 902(3) (1976);² and (2) whether the district court correctly ruled that plaintiff had forfeited his right to claim a wrongful discharge pursuant to § 11(c)(1) of the Occupational Safety and Health Act of 1970 ("OSHA"), 29 U.S.C. § 660(c)(1)(1976).³

1 The district court issued a Rule 54(b) certificate because no adjudication was made with respect to defendants The State Insurance Fund and Northbrook Excess and Surplus Insurance Company, both of whom disclaimed coverage under their respective policies.

2 33 U.S.C. § 902(3) (1976) provides:

"(3) The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

3 29 U.S.C. § 660(c)(1) (1976) provides:

"(c)(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter."

We agree with Judge Knapp's rulings with respect to both questions. We affirm.

I.

In his opinion dated June 3, 1981, Judge Knapp succinctly described the Bark Peking as follows:

"The [B]ark PEKING, launched in 1911 at Hamburg, Germany, is a four-masted steel-hulled 377-foot vessel weighing 2,883 net tons. Between 1974 and 1976 it was purchased for its present owners, defendant South Street Seaport Museum; towed across the Atlantic to New York; berthed for repairs on Staten Island; and, ultimately, towed to South Street Seaport. It there serves as a museum and is occasionally rented out to private parties as an entertainment hall. Although it remains capable of being towed, its rudder has been welded in one position and it has not put to sea under its own motive power since the 1930's. It is not subject to inspection by the United States Coast Guard and has not been so inspected. Its present owners affirm that they do not intend ever to return it to active navigation, and nothing in the record before us suggests a contrary intent."

We adopt Judge Knapp's description of the vessel which is supported by the record. We note only that, like all venerable vessels which never die, the Peking would like nothing more than to slip her moorings, ease into the harbor and head for the open seas, with the seagulls in her wake.

Sadly, she is fated not to do so.

II.

On December 12, 1979, plaintiff Craig McCarthy, a self-styled "historical ironworker and shiprigger," while employed by the Museum, was painting the upper mainmast and spars of the Peking. He was suspended in a bosun's chair which he controlled by a gantline—a length of one-inch manilla line.

The gantline "parted", causing plaintiff to fall some 60 feet where he grabbed a stay and thence climbed down another 60 feet to the deck below. He returned to work on March 13, 1980.⁴

On March 14, 1980, the day following his return to work, plaintiff, after conferring with members of the staff of the Museum, met with John B. Hightower, the president of the Museum. Plaintiff told Hightower that the *Peking* was seriously unsafe in several respects. Hightower, believing that plaintiff's conduct amounted to insubordination, fired him.

On June 9, 1980, plaintiff commenced the instant action in the Southern District of New York. In Count I of his complaint, plaintiff alleged admiralty and maritime jurisdiction and asserted a claim under the LHWCA for negligence against the Museum and the *Peking*, claiming that their negligence caused his fall on December 12, 1979. In Count II of his complaint, plaintiff alleged that the Museum discharged him in violation of his rights under the OSHA and the regulations promulgated thereunder.

Upon the Museum's motion for summary judgment, Judge Knapp, in a well reasoned opinion granted the motion with respect to both counts of the complaint and dismissed the action. From the judgment entered on Judge Knapp's opinion, this appeal has been taken.

III.

Turning to appellant's claim under the LHWCA, he contends, first, that he was an "employee" within the meaning of § 2(3) of the LHWCA, 33 U.S.C. § 902(3) (1976). Second, he contends that he was injured as the result of the negligence of a vessel within the meaning of 33 U.S.C. § 905(b) (1976), so that his remedies are not limited by the exclusivity provision of the LHWCA, 33 U.S.C. § 905(a) (1976). Since we hold that the

⁴ In order to obtain compensation for the injuries he sustained as the result of his fall on December 12, 1979, appellant applied for and received benefits under the New York Workers' Compensation Law.

record establishes that he was not engaged in maritime employment, we do not reach his second contention.

In *P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979), the Supreme Court explained that the status test for recovery under the LHWCA is not directed at geographical considerations but "refers to the nature of a worker's activities." ⁵ *Id.* at 78. The fact that appellant's accident took place on the Peking is not dispositive of the question of whether he was engaged in "maritime employment" within the meaning of § 2(3) of the LHWCA.

Our Court, in decisions since *Pfeiffer*, has interpreted the status test to "preclud[e] any application of the LHWCA . . . to an employee whose activities do not bear a significant relationship to navigation or to commerce on navigable waters." *Fusco v. Perini North River Associates*, 622 F.2d 1111, 1113 (2 Cir. 1980), cert. denied, 449 U.S. 1131 (1981). *Accord, Churchill v. Perini North River Associates*, 652 F.2d 255, 256 n.1 (2 Cir. 1981) (per curiam) (quoting *Fusco*), cert. granted *sub nom. Director, Office of Workers' Compensation Programs v. Perini*, ____ U.S. ____ (1982). Other courts of appeals have adopted or retained similar tests subsequent to *Pfeiffer*. E.g., *Duncanson-Harrelson Co. v. Director, Office of Workers' Compensation Programs*, 644 F.2d 827, 830 (9 Cir. 1981); *Odom Construction Co. v. Department of Labor*, 622 F.2d 110, 113 (5 Cir. 1980), cert. denied, 450 U.S. 966 (1981). The latter two cases rely on *Weyerhauser Co. v. Gilmore*, 528 F.2d 957 (9 Cir. 1975), cert. denied, 429 U.S. 868 (1976), a pre-*Pfeiffer* case which stated a requirement that "maritime employment" must have "a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters.'" *Id.* at 961, quoting *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 272 (1972).

⁵ The LHWCA also includes situs requirements which are geographical in nature. *Pfeiffer, supra*, at 73-74. There is no suggestion that the LHWCA's situs requirements are not satisfied in the instant case where the accident did take place on navigable waters.

We hold that appellant has not satisfied the status test. The Peking's rudder has been welded in one position. She has not put to sea under her own power since the 1930's. Her present owners state that they do not intend to return her to active navigation. The LHWCA was intended to apply only to workers employed in activities related to vessels which at least have the potential to engage in navigation or in commerce on navigable waters. The Peking no longer has that potential.

The cases cited by appellant do not support a contrary conclusion. For example, in *Arbeeny v. McRoberts Protective Agency*, 642 F.2d 672 (2 Cir.), *cert. denied*, ____ U.S. ____ (1981), we set aside orders of the Benefits Review Board which denied recovery on the ground that the petitioner pier guards were not engaged in "maritime employment" within the meaning of § 2(3). In that case the dispositive factor was that petitioners' "major function . . . was to protect against the loss of cargo which unquestionably serves a maritime purpose—the safe transit of goods shipped by sea." *Id.* at 675. Appellant's work in the instant case served no such purpose.

Likewise, appellant's reliance on *Mississippi Coast Marine, Inc. v. Bosarge*, 637 F.2d 994 (5 Cir.), *modified*, 657 F.2d 665 (1981), is misplaced. There, the Fifth Circuit reviewed an order of the Benefits Review Board which affirmed an award to respondent who, at the time of his injury, was working on a pleasure boat in his employer's boatyard. Respondent's usual work was that of a land-based carpenter in the boatyard. The Fifth Circuit affirmed the award because "[i]t is difficult to conceive of an activity more fundamental to maritime employment than the building and repair of *navigable* vessels." *Id.* at 998 (emphasis added). Appellant's work in the instant case, unlike that in *Bosarge*, bore no relationship to navigation or commerce on navigable waters.

We hold that, since appellant was not engaged in "maritime employment" within the meaning of § 2(3) of the LHWCA, the district court correctly granted the Museum's motion for summary judgment with respect to Count I.

IV.

This brings us to appellant's second count which alleged that his discharge was discriminatory in violation of § 11(c)(1) of the OSHA, 29 U.S.C. § 660(c)(1)(1976), because he had complained that the Peking was unsafe. The district court granted summary judgment as to this count on the ground that appellant had failed to file a timely complaint with the Secretary of Labor, as required by § 11(c)(2) of the OSHA, 29 U.S.C. § 660(c)(2) (1976).⁶

Appellant now urges us to hold that there is a private right of action under § 11(c)(1) of the OSHA. The Sixth Circuit declined to imply such a right of action in *Taylor v. Brighton Corp.*, 616 F.2d 256 (6 Cir. 1980). In the instant case, we hold that there is no need for us to reach this question, since appellant did not exhaust the administrative remedies which were available to him.

Whether § 11(c)(2) precludes a private right of action under § 11(c)(1), as the Sixth Circuit held in *Taylor*, appellant first must utilize the remedies provided by Congress. *See, e.g., McKart v. United States*, 395 U.S. 185 (1969). Appellant failed to file a timely complaint with the Secretary. The word "may" in § 11(c)(2) does not mean that the remedy provided for in that section is merely one of several alternatives. While we do not reach the question whether there is an implied private right

6 29 U.S.C. § 660(c)(2) (1976) provides:

"(2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown, to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay."

of action under § 11(c)(1), we do hold that, even if one existed, it could be invoked only after the filing of a timely complaint with the Secretary had proved fruitless.

We hold that, since appellant failed to exhaust his administrative remedies, the district court correctly granted the Museum's motion for summary judgment with respect to Count II.

Affirmed.

KEARSE, Circuit Judge, concurring:

I concur in the judgment of the Court and in Parts I-III of the majority opinion. With respect to Part IV of that opinion, I agree that plaintiff may not recover, but I do so because I conclude that, for the reasons set forth in *Taylor v. Brighton Corp.*, 616 F.2d 156 (6th Cir. 1980); *see also Pavolini v. Bard-Air Corp.*, 645 F.2d 144, 146 n.3 (2d Cir. 1981), there is no implied right of action under 29 U.S.C. § 660(c).

District Court Memorandum and Order

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 Civ. 3258 (WK)

CRAIG McCARTHY,

Plaintiff,

—against—

THE BARK PEKING, HER SAILS, EQUIPMENT, APPUR-
TENANCES, ETC., and SOUTH STREET SEAPORT MUSEUM,

Defendant and Third-Party Plaintiff,

—against—

THE STATE INSURANCE FUND and NORTHBROOK
EXCESS AND SURPLUS INSURANCE COMPANY,

Third-Party Defendants.

MEMORANDUM AND ORDER

KNAPP, D.J.

The bark PEKING, launched in 1911 at Hamburg, Germany, is a four-masted steel-hulled 377-foot vessel weighing 2,883 net tons. Between 1974 and 1976 it was purchased for its present owners, defendant South Street Seaport Museum; towed across the Atlantic to New York; berthed for repairs on Staten Island; and, ultimately, towed to South Street Seaport. It there serves as a museum and is occasionally rented out to private parties as an entertainment hall. Although it remains capable of being towed, its rudder has been welded in one

position and it has not put to sea under its own motive power since the 1930's. It is not subject to inspection by the United States Coast Guard and has not been so inspected. Its present owners affirm that they do not intend ever to return it to active navigation, and nothing in the record before us suggests a contrary intent.

On December 12, 1979 plaintiff, who was at that time an employee of defendant South Street Seaport Museum, was injured when a gant line gave way as he was repainting the PEKING's mast and spars in the course of his duties as an "historic ironworker." He returned to work on March 13, 1980. He has since filed a claim for workmen's compensation under, and has received benefits pursuant to, the New York Workmen's Compensation Law. He returned to work on March 13, 1980.

On March 14, 1980, after conferring with various low-level members of the museum administration, plaintiff met with the president of the defendant museum and asserted that the PEKING was seriously unsafe in several respects. The president, claiming that plaintiff's conduct amounted to insubordination, responded by firing him.

Plaintiff thereafter initiated this lawsuit against the bark PEKING and her owners, defendant South Street Seaport Museum. In Count I of the complaint plaintiff alleges admiralty and maritime jurisdiction and purports to state a claim against each defendant for negligence causing his December 12, 1979 fall. In Count II plaintiff claims that defendant South Street Seaport Museum discharged him in violation of his rights under § 11(c)(1) of the Occupational Safety and Health Act of 1970 ("OSHA"), 29 U.S.C. § 660(c)(1), and regulations promulgated thereunder, 29 C.F.R. § 1977.9(c) and seeks back-pay and an order requiring the museum to reinstate him to his employment and to refrain from instructing him to work in unsafe conditions.

The defendants now move for summary judgment on both counts. For reasons that follow, we grant that motion.

*Discussion**Count I*

It is now settled that the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* ("LHWCA"), extends only to workers engaged in "maritime employment." *P.C. Pfeiffer Co., Inc. v. Ford* (1979) 444 U.S. 69, 73; *Fusco v. Perini North River Associates* (2d Cir. 1980) 622 F.2d 1111, 1113, *cert. denied sub nom. Sullivan v. Perini North River Associates* (1981) 101 S. Ct. 953. Having carefully considered the arguments of counsel, we conclude that plaintiff was not engaged in such "maritime employment."

In *Fusco*, the Second Circuit construed "maritime employment" to import a "realistically significant relationship to maritime activities involving navigation and commerce over navigable waters." *Fusco, supra*, 622 F.2d at 1112. This brings to mind Judge Dawson's observations concerning admiralty law in *McGuire v. City of New York* (S.D.N.Y. 1961) 192 F. Supp. 866. He there stated (at 871):

"Admiralty law is, in fact, the law of commerce. It was engendered as a result of the needs of commerce and flourished because of those same needs. Where it was feared that local ordinances or decisions might unduly impinge on international or interstate commerce, local statutes were held inapplicable in the face of the need for uniformity in maritime law. The touchstone has been whether the action . . . was not merely one of local concern but was in fact a thing having an intimate relation with navigation and interstate and foreign commerce."

In the case at bar plaintiff's employment had no relationship to navigation or to commerce over navigable waters. He was a museum employee and his activities related to keeping the museum in order. It is immaterial that the museum had at one time been a vessel in navigation, or that it happens to be located on navigable waters. Neither of these facts creates a "realistically significant relationship" between plaintiff's em-

ployment and ongoing navigation, or between such employment and interstate or foreign commerce. To the contrary, it is clear that plaintiff's employment was of purely local concern.¹

Plaintiff apparently concedes—as he must—that unless his negligence claim falls within the ambit of LHWCA, it is barred by the exclusivity provision of the New York Workmen's Compensation Law, *O'Rourke v. Long* (1976) 41 N.Y.2d 219, 391 N.Y.S.2d 553. It follows that such claim must be dismissed.

Count II

Plaintiff predicates his claim for wrongful discharge on § 11(c)(1) of OSHA, 29 U.S.C. § 660(c)(1). That section prohibits an employer from discharging an employee for exercising "any rights" afforded by OSHA. It is clear beyond peradventure, however, that plaintiff is in no position to claim relief under OSHA. The statute sets forth in express detail the procedures to be followed by an employee who believes he has been discharged or otherwise discriminated against in violation of § 11(c)(1)—i.e., because he has exercised any rights afforded him by the Act. Specifically, the statute provides in § 11(c)(2), 29 U.S.C. § 660(c)(2), that such an employee:

"may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this

¹ Any argument that the nature and location of the PEKING may have imposed a greater duty of care on its owners than that borne by owners of less intrinsically dangerous structures goes to the question of negligence and not to the question of coverage under LHWCA.

subsection and order all appropriate relief including re-hiring or reinstatement of the employee to his former position with back pay."

Having never filed a complaint with the Secretary alleging that his discharge on March 14, 1980 constituted discrimination within the meaning of § 11(c)(1), plaintiff has forfeited any right OSHA may have afforded him to a remedy for such discharge. We need pass on no other question.

It follows that defendant's motion for summary judgment must be granted. The action is dismissed.

SO ORDERED.

Dated: New York, New York
June 3, 1981

WHITMAN KNAPP, U.S.D.J.

**Affidavit of Norman Brouwer in Support of
Motion For Summary Judgment**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

80 Civ. 3258 (WK)

CRAIG McCARTHY,

Plaintiff,

—against—

The Bark PEKING, her sails, equipment, appurtenances, etc.,
and SOUTH STREET SEAPORT MUSEUM,

Defendant and Third-Party Plaintiff,

—against—

THE STATE INSURANCE FUND and NORTHBROOK
EXCESS AND SURPLUS INSURANCE COMPANY,

Third-Party Defendants.

AFFIDAVIT

STATE OF NEW YORK
COUNTY OF NEW YORK, ss.:

NORMAN BROUWER, being duly sworn, deposes and says:

1. I am the historian of the South Street Seaport Museum, curator of collections and the associate editor of Seaport Magazine responsible for historical accuracy. In my role as historian I have become familiar with the full history of the museum artifact PEKING and I now summarize that history.

2. PEKING was built in 1911 at Hamburg, Germany and entered the nitrate trade. In 1914, PEKING was caught at Valparaiso, Chile by the outbreak of World War I. At the conclusion of that war, she was awarded to Italy as reparations, but made only one passage under the Italian flag, from Valparaiso to Europe when she was laid up. In 1922 PEKING returned to the nitrate trade and continued in that trade until 1931 when she was purchased by the British Shaftesbury Homes and Arethusa Society where she was used as a floating school for boys. Conversion of PEKING for her schoolship hulk duties included installation of berthing spaces, offices, classrooms, a combination auditorium and gym, library, chapel and living quarters for the school's headmaster. PEKING was renamed ARETHUSA during this period, which was disrupted only during World War II when PEKING was used to provide accommodations for Royal Navy engineering petty officers at Chatham Dockyard.

3. On October 31, 1974 PEKING was purchased for the South Street Seaport Museum by the J. Aron Charitable Foundation at which time the name was changed back from ARETHUSA to PEKING.

4. PEKING was towed from England to New York by the Dutch tug UTRECHT and arrived in New York on July 22, 1975. PEKING had no motive power of its own and, indeed, was treated as a floating hulk by both English and United States customs officials.

5. PEKING is located at the South Street Seaport Museum. PEKING has not served as a commercial cargo vessel since at least 1931. PEKING lacks any motive power and the rudder has been welded into a fixed position since the 1930's such that PEKING would be incapable of movement under its own power.

6. At present restoration work is performed aboard PEKING, but for the sole purpose of restoring PEKING as a historically accurate museum exhibit and not for purposes of making PEKING fit for a return to traditional maritime

navigation and commerce, such as carrying passengers or freight for hire.

7. PEKING is not an enrolled or registered vessel and has not been such since its sailing days, with the possible exception of the World War II use by the Royal Navy, at which time PEKING was used only to provide accommodations to Royal Navy personnel.

8. PEKING is not subject to inspection and in fact has not been inspected by the United States Coast Guard.

/s/ NORMAN J. BROUWER
Norman Brouwer

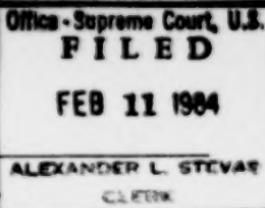
Sworn to before me this
21st day of April, 1981

/s/ SUSAN J. PULASKI

Notary Public

Susan J. Pulaski
Notary Public, State of New York
No. [illegible]
Qualified in Kings County
Commission expires on March 30, 1982

No. 83-851.



In the
Supreme Court of the United States.

OCTOBER TERM, 1983.

SOUTH STREET SEAPORT MUSEUM,
As OWNER OF THE BARK PEKING,
Petitioner,

v.

CRAIG McCARTHY,
Respondent,
AND
THE STATE INSURANCE FUND AND NORTHBROOK
EXCESS AND SURPLUS INSURANCE COMPANY,
Respondents.

Brief in Opposition to Petition for Writ of Certiorari.

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No. 83-851.

In the
Supreme Court of the United States.

OCTOBER TERM, 1983.

SOUTH STREET SEAPORT MUSEUM,
As Owner of The Bark PEKING,
Petitioner,

v.

CRAIG McCARTHY,
Respondent,
AND
THE STATE INSURANCE FUND AND NORTHBROOK
EXCESS AND SURPLUS INSURANCE COMPANY,
Respondents.

Brief in Opposition to Petition for Writ of Certiorari.

Introduction.

The respondent in this matter, Craig McCarthy, is a working man who was injured on December 12, 1979, when a gantline parted and he dropped sixty feet down the mainmast of the PEKING, a four-masted bark moored afloat at a pier on lower Manhattan. The injuries to his spine and internal organs were serious. He underwent an exploratory lap-

arotomy — abdominal surgery — and suffered the removal of a third of his large intestine.

The ship was owned by his employer, the petitioner South Street Seaport Museum, which had: 1) taken the gantline aboard knowing it was unfit; 2) stored it in a leaky bosun's locker, increasing its deterioration; and 3) directed that it be used for Mr. McCarthy's work aloft, painting the mast. Mr. McCarthy brought this action under § 5(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b), which allows an employee to bring an action and recover against an employer vessel for injuries "caused by the negligence of the vessel" — here, the acquisition, storage, and use of the defective gantline.

The case has not yet gone to trial. The district court granted summary judgment for South Street, holding that Mr. McCarthy was not engaged in "maritime employment," 1981 A.M.C. 2995 (S.D. N.Y. 1981). The Court of Appeals agreed, 676 F.2d 42 (1982). That issue was put to rest when this Court vacated the judgment and remanded the case for further consideration in light of *Director, OWCP v. Perini North River Associates*, 459 U.S. ___, 103 S.Ct. 634, 74 L.Ed.2d 465 (1983), 459 U.S. ___, 103 S.Ct. 809, 74 L.Ed.2d 1010 (1983).

On remand, South Street argued that, whatever the nature of Mr. McCarthy's employment, its ship is not a "vessel" within the meaning of the Act. The Court of Appeals reached the not surprising conclusion that a four-masted steel-hulled 377-foot vessel weighing 2,883 net tons is indeed a vessel, 716 F.2d 130 (2d Cir. 1983). South Street thereupon petitioned for a writ of certiorari. This brief is respectfully submitted, at the Court's request, in opposition to that petition.

There are two reasons why the petition should be denied and the case sent back to the district court for a prompt trial.

The Statutes.

First, the general statutory definition of "vessel" is clear and unambiguous. The term "includes every description of water-craft or other artificial contrivance used, *or capable of being used*, as a means of transportation on water." 1 U.S.C. § 3 (emphasis added).¹ There is no legitimate question, even at this pretrial stage of the case, that the PEKING fits this statutory definition and that this Court should not spend any time reviewing the issue.

As the court below noted, the further definition of "vessel" which Congress does use in the Longshoremen's and Harbor Worker's Act, 33 U.S.C. § 902 (21), is merely circular. 716 F.2d at 134, neither adding to nor detracting from the language of 1 U.S.C. § 3. For that matter, Congress could not conceivably have intended to impose on this Act the limitation sought by the petitioner, that vessels covered by it be "navigating," or "in navigation," because the definitional section of the Act expressly provides, at § 902(3), that the covered employees include a "ship repairman" and a "ship-breaker." While repairmen may often, but not always, be engaged in work aboard vessels in navigation, ship-breakers — the knackers who tear apart dead hulks — manifestly never are aboard ships which have anything but a residual capacity to be used as a means of transportation.

In the present case, therefore, the rule sought by South Street — limiting § 905(b) only to vessels in navigation —

¹ When Congress has sought a more restrictive definition, it has found no difficulty in drafting one. Thus, in 46 U.S.C. 713, applying to merchant seamen and principally to the benefits afforded by the Jones Act (46 U.S.C. § 688 *et seq.*), but not to the statute in issue here and expressly limited to title 46, "vessel" is defined as "every description of vessel navigating on any sea or channel, lake or river, to which the provisions of this title may be applicable."

would lead to a thoroughly anomalous result. Although injured while painting the ship in order to repair and protect it, Mr. McCarthy would be deprived of the remedy expressly allowed by the statute. When the PEKING is ultimately broken up, however, some ship-breaker, were he to be injured in precisely the same fashion while dismantling the ship's top-hamper, would have an undeniable claim for relief against South Street.

There is no real basis in precedent, moreover, for reading into this statute a limitation which Congress so manifestly did not intend to impose. The petition cites a large and confusing assortment of cases from various branches of the law of admiralty — a monument to the technical obstacles faced by a plaintiff trying to obtain justice from the maritime industry — but virtually all of those cases have to do with the Jones Act or with the doctrine of unseaworthiness. (The balance contain *obiter dicta* but do not squarely address the issue presented here.)

The respondent of course concedes the soundness of limiting the Jones Acts' liberal benefits to merchant seamen aboard ships in navigation. Similarly, there is ample justification for limiting the doctrine of unseaworthiness — essentially, strict liability — to situations in which a ship should be expected to be seaworthy, that is, when it is or is going to be at sea.

Here, on the other hand, there is no Jones Act or unseaworthiness claim. Mr. McCarthy, who was undoubtedly a harborworker, a ship repairman engaged in maritime employment, seeks nothing more than the opportunity to prove that South Street's ship, and the management of that ship, failed in its duty of reasonable care. This is an opportunity clearly granted to him by Congress and not foreclosed by any apposite decision of this Court.

The Ship.

Second, the bark PEKING is in all relevant physical respects a ship. It has a tophamper (upper masts and spars), periodically in need of repainting. It has the bosun's chairs and line needed to do that repainting. It has a bosun's locker for storing that line — specifically here, a bosun's locker with a leaky overhead. It has someone to manage its operations and maintenance, e.g. in 1979, a manager who took aboard line he knew was unfit, and, after Mr. McCarthy's injuries, a new manager, an experienced merchant seaman carrying the title of "shipmaster." As would any other ship, it floats on the waters of the East River, exposed to the salt air, its tophamper rolling with the waves and wakes.

There is in the record below the affidavit of an experienced Navy Chief Boatswain's Mate and marine safety instructor (attached heretofore in full as an appendix). He says:

5. As I know from my experience at sea and at the [United States Merchant Marine] Academy, any ship, sail or power, is a large and complex piece of machinery designed and maintained to float on navigable waters. Ships used in navigation and ships permanently moored as museums are in most respects, relevant to lines and cordage, identical because they both must be moored, they both float, they both are visited by numbers of people, they both have various unattached appurtenances, and they both are exposed to the elements.

11. As I also personally know from my experience at sea and in teaching shipboard safety, precisely the same precautions should attend activity aloft whether a ship is

moored to a cargo pier or to a museum pier: when manila line is to be used as a gantline, it should be stowed in a completely dry Bosun's locker (so that exposure to water does not cause it to deteriorate more rapidly than normal); it should be used as a gantline only by or under the supervision of a person with an AB rating (gained only after six years at sea) or with comparable training and experience; it should be inspected by such a supervisor before each use by twisting open the lays and looking for broken fibers; and it should not be used for such a purpose if it is more than a year old.

12. It has been my experience that lines kept aboard properly managed ships for use as gantlines are always kept in the best of conditions because they are used to support human life.

The standard of care in negligence actions in a maritime context was set down by this Court in *Kermarec v. Compagnie Generale*, 358 U.S. 625, 632 (1959), as being "the duty of exercising reasonable care under the circumstances of each case." Here, it is impossible to ignore the fact that Mr. McCarthy, aloft in the tophamper of the PEKING, faced precisely the same set of circumstances he would have faced aloft in the tophamper of a vessel in navigation.

This very issue was addressed long ago by the District Court for the District of Massachusetts in *The C.H. Northam*, 181 F. 983 (1909), applying the predecessor of 1 U.S.C. § 3 to determine whether a hulk being dismantled on a Boston Harbor Island set adrift by a storm and thereby causing damage in a nearby anchorage, was a vessel. The court found, of course, that the PEKING was a vessel and for the most sensible of reasons: "[T]he negligence did not differ in character, so far as appears, from the negligence which would have been the

cause of the same damage if the craft placed on the beach and negligently permitted to go adrift had been in every respect a complete vessel." (181 F. at 985.)

The admiralty law of this nation is not so barren of common sense as to need this Court to tell it that a four-masted, 377-foot ship is, for purposes of determining the duty of care owed to its workers, a vessel.

The Claim to Charitable Immunity.

Finally, two associations of maritime museum operators have filed with this Court a joint brief of *amici curiae*, suggesting that: "The cost of restoring and preserving historic ships is so large and the available funds so small that historical ship preservation is already an endangered species. By raising considerably the cost of restoring and preserving historic ships, the decision below threatens total extinction of historic ship preservation efforts in the United States." (Brief of *amici curiae*, pp. 4-5.)

This is little more than an attempt to obtain for these ship museums the protection of the doctrine of charitable immunity. That doctrine has long been discredited, *President and Dir. of Georgetown College v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942), and in all other areas of the law it has declined if not died. As Professor Prosser wrote in 1971, "the immunity of charities is clearly in full retreat; and it may be predicted with some confidence that the end of the next two decades will see its virtual disappearance from American Law." *Torts*, 4th ed., § 133, p. 996. See, also, *Restatement, Torts*, § 895E.

If this full retreat is to be reversed by this Court, the present case is the least appropriate with which to do it. The peti-

titioner museum, as it happens, is a major power in New York City real estate, part of "a \$216-million dollar package that stretches over seven blocks of lower Manhattan's most historic neighborhood."²

The *amicus curiae* National Maritime Historical Society, for its part, has identified as some of its sponsors and patrons the following entities: Abraham & Straus; Amerada Hess Corporation; Annenberg Fund; Vincent Astor Foundation; Bankers Trust Co.; Bloomingdales; Brooklyn Savings Bank; Chase Manhattan Bank; Chemical Bank; Crucible Steel Casting Company; Dow Corning Corp.; Gage & Tollner; W.R. Grace Foundation; Jakob Isbrandsten; Lykes Bros. Steamship Co., Inc.; Manufacturers Hanover Trust; Moore-McCormack Lines, Inc.; New York Telephone Co.; Ogilvy & Mather; Pinkerton's; Prudential Lines; RCA; Sea-Land Service, Inc.; and U.S. Lines.³

A responsible maritime museum has three options with respect to the sort of problems created for Mr. McCarthy. It can pay to assure that working conditions are so safe that injuries are not incurred by its workers. It can pay for insurance to compensate injured workers. It can itself make payments to compensate injured workers. What South Street and the two museum associations are asking this Court to allow is a fourth, irresponsible option — imposing the costs of injuries upon the injured workers.

The respondent does not at all mean to suggest that this is an unimportant case, a petition unworthy of this Court's attention. To Mr. McCarthy, the case is critically important. He was severely injured. He underwent major surgery. He still lives with his injuries. For South Street and the museum associations, playthings of wealthy real estate interests, banks,

²"The Waterfront Goes Boom", *New York magazine*, Nov. 10, 1980, p. 47.

³*Sea History magazine*, Autumn, 1982, p. 56.

and corporations, the petition is something else — an attempt to shirk responsibility. Mr. McCarthy is entitled to a prompt trial.

Conclusion.

For the foregoing reasons, the respondent Craig McCarthy respectfully submits that the petition for a writ of certiorari should be denied and the case should be remanded for trial in the United States District Court for the Southern District of New York.

Respectfully submitted,

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Of Counsel:

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Appendix.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

CRAIG McCARTHY,

Plaintiff,

-against-

80 Civ. 3258 (WK)

**The Bark PEKING, her sails, equipment,
appurtenances, etc., and SOUTH STREET
SEAPORT MUSEUM,**

Defendant and Third-Party Plaintiff,

-against-

**THE STATE INSURANCE FUND and
NORTHBROOK EXCESS AND SURPLUS
INSURANCE COMPANY,**

Third-Party Defendants.

STATE OF NEW YORK

ss.:

COUNTY OF SUFFOLK

Affidavit of Richard A. Browder.

RICHARD A. BROWDER, being first duly sworn, on his oath deposes and says that:

1. I reside at 68 Bayside Place, Amityville, New York, and am self-employed as a Marine Consultant. I make this affidavit of my own personal knowledge and in opposition to the defendants' pending motion for summary judgment.

2. I enlisted in the United States Navy in 1940 and retired in 1962 as a Chief Boatswain's Mate. In the course of my Naval service, I spent the first eight years on warships, then served

aboard merchant-type shipping and amphibious landing craft and spent two tours of duty as the Master of YTB's — ocean-going tugs.

3. In 1963, I was appointed an Instructor in Laboratory Seamanship at the United States Merchant Marine Academy, King's Point. Before retiring from the Academy, I also taught courses in Safety of Life at Sea (SOLAS) and first-year Navigation, and I originated a course in Marine Safety.

4. I have visited and examined two ships in use as museums — the frigate, USS CONSTITUTION, in Boston Harbor, and the bark, STAR OF INDIA, in San Diego Harbor.

5. As I know from my experience at sea and at the Academy, any ship, sail or power, is a large and complex piece of machinery designed and maintained to float on navigable waters. Ships used in navigation and ships permanently moored as museums are in most respects, relevant to lines and cordage, identical because they both must be moored, they both float, they both are visited by numbers of people, they both have various unattached appurtenances, and they both are exposed to the elements.

6. As a result of these similarities, both sorts of ships must be attached to piers when in harbor. Both sorts must maintain watertight integrity (that is, water must be kept from entering interior spaces, a point obviously of central importance to any kind of ship), as by using fenders to protect the hulls from adjacent piers. Both sorts of ships must restrict visitors' access to various parts of their decks, and both must lash or tie such appurtenances as accommodation ladders and boats. On both, the masts and rigging must be given routine maintenance.

7. For all of these necessary shipboard operations, all ships, including ships used as museums, must by their very nature keep on board quantities of line — various types of cordage. The line is used for rigging mooring lines, for braiding fenders, for cordoning off areas, for lashing appurtenances, and for rig-

ging Bosun's chairs to hoist men aloft. So far as these operations are concerned, it makes no difference whether a ship is used to carry cargo around Cape Horn or is used as a museum in New York Harbor.

8. The line needed aboard any ship is customarily, in maritime practice, stowed in an interior space known as a "Bosun's locker" and is customarily provided for these operations by the ship, not by ship-based repairmen.

9. I am informed and believe that there is testimony in this case to the effect that line used aboard the bark PEKING was stowed in a space below decks referred to by witnesses as "the Bosun's locker," and that line from the Bosun's locker was furnished to the plaintiff, Craig McCarthy, for use as a gantline to hold his Bosun's chair aloft during maintenance work on the ship's mainmast.

10. As I personally know from my own experience at sea, this storage of line aboard the Bark PEKING, and the supplying of it from the Bosun's locker to the plaintiff for use as a gantline, is entirely consistent with maritime practice aboard ships actually in navigation. Precisely the same things would have been done had the PEKING been at sea, in a foreign harbor, or in New York as part of a voyage.

11. As I also personally know from my experience at sea and in teaching shipboard safety, precisely the same precautions should attend activity aloft whether a ship is moored to a cargo pier or to a museum pier: when manila line is to be used as a gantline, it should be stowed in a completely dry Bosun's locker (so that exposure to water does not cause it to deteriorate more rapidly than normal); it should be used as a gantline only by or under the supervision of a person with an AB rating (gained only after six years at sea) or with comparable training and experience; it should be inspected by such a supervisor before each use by twisting open the lays and

looking for broken fibers; and it should not be used for such a purpose if it is more than a year old.

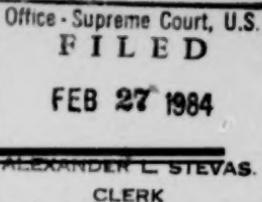
12. It has been my experience that lines kept aboard properly managed ships for use as gantlines are always kept in the best of conditions because they are used to support human life.

/s/ _____

RICHARD A. BROWDER

Sworn to before me this day of April, 1981

Notary



IN THE
Supreme Court of the United States
OCTOBER TERM 1983

SOUTH STREET SEAPORT MUSEUM,
as Owner of the Bark PEKING,

Petitioner,

—v.—

CRAIG McCARTHY,

Respondent,

—and—

THE STATE INSURANCE FUND and NORTHBROOK EXCESS AND
SURPLUS INSURANCE COMPANY,

Respondents.

PETITIONER'S REPLY BRIEF

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IN THE
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No. 83-851

SOUTH STREET SEAPORT MUSEUM,
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CRAIG McCARTHY,

Respondent,

—and—

THE STATE INSURANCE FUND and NORTHBROOK EXCESS AND
SURPLUS INSURANCE COMPANY,

Respondents.

PETITIONER'S REPLY BRIEF

STATEMENT

Petitioner submits this Reply Brief because Respondent in his Brief in Opposition seems largely to have lost sight of the issues presented in the Petition—until at least the very end when he acknowledges (p. 8)

“The respondent does not at all mean to suggest that this is an unimportant case, a petition unworthy of this Court’s attention.”

Respondent’s arguments which are relevant to the pertinent issues stress the decision in *The C.H. NORTHAM*, 181 F. 983 (Dist. Ct. Mass. 1909) which, if it ever was, is no longer

authoritative as to what qualifies as a "vessel" for purposes of limitation of liability.

Reemploying the same reasoning to make the *a fortiori* argument that if C.H. NORTHAM were a vessel then certainly PEKING must be, Respondent then urges that since one dismantling such a vessel would be entitled to sue his employer/shipowner under the LHWCA, Respondent, painting such a vessel, should certainly have the same opportunity. As will be seen, the argument collapses in the face of the language and history of 33 U.S.C. § 905(b).

THE NON-ISSUES

1. Respondent dedicates a not insubstantial portion of his Brief to a recitation of what his claim on the merits may be. Presuming he is permitted to sue Petitioner for "negligence of a vessel" under § 905(b) of the LHWCA, the merits of whatever cause of action Respondent may have are not before this Court nor have they formed any part of the issues resolved by the lower courts. Consequently, Petitioner, although having an altogether different version of the circumstances of Respondent's claim, will not be drawn into such a discussion¹ at this stage.

2. Any issues as to the kind and extent of Respondent's injuries as set forth in his Brief are also irrelevant to the issues now presented to this Court with respect to the status of PEKING. Petitioner will therefore exercise the same restraint as set forth in *1 supra* except a) to agree, as it has throughout, that Respondent was indeed injured at the time and place alleged, and b), in order to rebut the misleading inference of continuing disability raised (p. 8) in Respondent's Brief, to note the language of the first opinion of the Court of Appeals (Petition p. 19a) 676 F.2d 42, 44 (1982) that Respondent,

¹ Petitioner's forbearance is also applicable to the affidavit contained in Respondent's appendix which, to the extent it may be relevant at all, is concerned with the merits of Respondent's claim.

admittedly injured on December 12, 1979, "returned to work on March 13, 1980".

3. To the extent that Respondent may be suggesting (p. 8) to the Court that he is remediless for his injuries, Petitioner refers again to the first opinion of the Court of Appeals (Petition p. 19a) 676 F.2d 42, 44, where, in footnote 4, the Court observed that Respondent "applied for and received benefits under the New York Workers' Compensation Law." Petitioner has also acknowledged (Petition p. 7) that following this Court's decision in the *Perini* case, Respondent is entitled to benefits under the LHWCA rather than the New York Act.

Respondent, The State Insurance Fund, in its Brief (p. 9) before this Court on the first petition (October Term 1982, No. 82-53), as well as in its answer to the third party complaint herein, has fully accepted its responsibility as workmen's compensation insurer for Petitioner whether under the New York State Act or the LHWCA. Respondent is therefore as well protected as the vast majority of employees in the United States who, when injured on their employer's premises, may obtain workmen's compensation benefits but may not sue their employer for third party damages. Both insurance company Respondents have, however, disclaimed coverage under their policies with Petitioner for any status of Petitioner as a "vessel owner".

4. Because the Amici Curiae note the cost burdens to maritime museums of not only paying workmen's compensation benefits but also third party damages if their historic ships are deemed vessels under § 905(b) of the LHWCA, Respondent maintains that they have invoked the doctrine of charitable immunity. Having erected this shaky edifice, Respondent then proceeds with its demolition. What the Amici Curiae have urged however is nothing more than what this Court recognized in *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74 (1980), namely that the 1972 amendments to the LHWCA intended to reduce litigation to insure that employers have

sufficient funds to pay the additional compensation rate—all as more fully discussed in the Petition pp. 10-13.

5. On page 8 of his Brief and as his finishing thrust or purported coup-de-grace, Respondent mounts a "deep pockets" argument by listing some of the sponsors and subscribers of the National Maritime Historical Society. Presumably space limitations forbade listing all 7,500 members mentioned by this Society on page 1 of the Amici Brief which also notes its fund raising efforts and the contributions of money and services by diverse organizations. While Respondent's thrust may have a certain jury appeal—although even juries appreciate a lighter touch—its employment before this Court would seem to fall short of the appropriate.

THE ISSUE

The issue here as stated more in detail in the Petition is essentially whether or not PEKING is a vessel within the meaning of § 905(b) of the LHWCA. While the Court of Appeals has reached differing conclusions as to the status of PEKING, there has, remarkably, been no controversy over the facts as to PEKING through one District Court and two Court of Appeals opinions. Nor does Respondent raise any factual question of substance as to PEKING in his Brief in Opposition. Respondent, however, does urge two arguments in support of his thesis that PEKING is a vessel. These are without foundation, respectively, in case law and under the LHWCA.

1. Respondent cites *The C.H. NORTHAM*, 181 F. 983 (1909) (Dist. Ct. Mass. 1909) for the proposition that a steamer which had been taken ashore for dismantling, which had her mast and engines removed and which in the course of a storm went adrift and caused damage without the owner's knowledge was a vessel for purposes of limitation of liability. The argument goes on to assert that if *The C.H. NORTHAM* was a

vessel then PEKING² must be. Overlooked are a) The C.H. NORTHAM was not being qualified as a "vessel" under § 905(b) of the LHWCA and, more importantly, b) whatever validity the decision had in 1909 was effectively overruled in 1926 by this Court's decision in *Evansville & Bowling Green Packet Company v. Chero Cola Bottling Company*, 271 U.S. 19. This Court, employing the same statutory definition of a vessel used by Respondent, denied limitation, holding that a wharfboat, "not subject to government inspection" (p. 21), but capable of being towed was not (p. 22) "practically capable of being used as a means of transportation." Interestingly enough, The C.H. NORTHAM, *supra*, was cited in the *Evansville* case on two occasions in the briefs of unsuccessful appellant's counsel, 70 L. Ed. 805, 806. Moreover, this Court noted the philosophic purpose of the limitation of liability rule (p. 21) "to promote the building of ships, to encourage the business of navigation . . ."—concepts antithetical to the demolition of vessels.

2. Respondent presses the argument (p. 3) that because Section 902(3) includes within the coverage of the LHWCA not only ship repairmen but ship-breakers, and because the latter would be involved only in working on ships no longer in navigation, an anomalous result would obtain under Petitioner's argument whereby Respondent, a ship repairman, would be deprived of his § 905(b) remedy whereas a ship-breaker "would have an undeniable claim for relief against South Street" (p. 4).

What is patently wrong with this argument, apart from begging the question, becomes evident when we examine the second and third sentences of § 905(b). Unlike § 902(3), which includes ship-breakers for purposes of compensation coverage, the language of § 905(b), in qualifying the negligence cause of action for those who may sue a vessel, makes no mention of those engaged in ship-breaking activities. Nor does the House

2 Inadvertently described (p. 6) as the vessel in the authority cited.

Report³ cited by this Court in *Jones & Laughlin Steel Corporation v. Pfeifer*, ____ U.S. ___, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983). It may be assumed that this Congressional omission was advised, for as Respondent says, (p. 3) ship-breakers "manifestly never are aboard ships which have anything but a residual capacity to be used as a means of transportation" and, perforce, they do not work aboard vessels which are actively in service.

CONCLUSION

Respondent's reasons for opposing the Petition are insubstantial. Indeed he acknowledges the importance of the issue. It is respectfully submitted that for all the reasons stated in the Petition a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals of the Second Circuit entered on August 23, 1983, that the foregoing be reversed and that Respondent be referred to the not ungenerous workmen's compensation benefits available to him under the LHWCA, as described in this Court's decisions in *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74 (1980) and *Rodriguez v. Compass Shipping Co., Ltd.*, 451 U.S. 596 (1981).

Respectfully submitted,

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³ H.R. Rep. No. 92-1441, 92d Cong. 2d Sess. reprinted in (1972) U.S. Code Cong. & Admin. News 4705.

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MOTION FILED
DEC 23 1983

No. 83-851

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

SOUTH STREET SEAPORT MUSEUM,
as Owner of the Bark PEKING,

Petitioner,

— v. —

CRAIG McCARTHY,

Respondent,

— and —

THE STATE INSURANCE FUND and NORTHBROOK EXCESS AND
SURPLUS INSURANCE COMPANY,

Respondents.

**MOTION OF NATIONAL MARITIME HISTORICAL
SOCIETY AND NATIONAL MARITIME MUSEUM
ASSOCIATION FOR LEAVE TO FILE A BRIEF AMICI
CURIAE IN SUPPORT OF THE PETITION FOR WRIT
OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT**

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**MOTION OF NATIONAL MARITIME HISTORICAL
SOCIETY AND NATIONAL MARITIME MUSEUM
ASSOCIATION FOR LEAVE TO FILE A BRIEF AMICI
CURIAE IN SUPPORT OF THE PETITION FOR WRIT
OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT**

Amici Curiae, National Maritime Historical Society and National Maritime Museum Association, hereby move pursuant to United State Supreme Court Rule 36.1 for leave to file a brief amici curiae in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit which has been filed in this matter by Petitioner, South Street Seaport Museum. A copy of the proposed brief is attached hereto.

In support of their Motion, National Maritime Historical Society and National Maritime Museum Association represent as follows:

1. A Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit (the "Petition") was docketed in this matter on November 21, 1983, by Petitioner, South Street Seaport Museum.
2. Amici Curiae, National Maritime Historical Society and National Maritime Museum Association, have a substantial interest in the Petition and request that this Court grant a Writ for the reasons set forth in the attached brief.
3. Respondent, Craig McCarthy, has refused consent for National Maritime Historical Society and National Maritime Museum Association to file a brief amici curiae in support of the Petition.
4. Where, as here, Respondent has refused consent, United States Supreme Court Rule 36.1 provides that a motion for leave to file a brief amici curiae supporting a Petition for Writ of Certiorari may be filed on or before the date that Respondent's brief in opposition to the Petition must be filed.

II

5. Respondent, Craig McCarthy's, brief in opposition to the Petition must be filed within thirty (30) days of receipt of the Petition. United States Supreme Court Rule 22.1.

6. The attorney for Respondent, Craig McCarthy, received the Petition on November 28, 1983, as per the letter attached as Exhibit "A" hereto, so Respondent's brief in opposition to the Petition must be filed within thirty (30) days thereof, by December 28, 1983.

7. This motion is timely because it was filed on or before December 28, 1983.

WHEREFORE, National Maritime Historical Society and National Maritime Museum Association request the Court to grant their motion for leave to file the attached Brief Amici Curiae in support of the Petition.

Respectfully submitted,

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December 19, 1983

617-451-1500
TELEX 240685
CABLE SALAWAY

Federal Express

Wayne W. Soujanen, Esquire
Pepper, Hamilton & Schneetz
123 South Broad Street
Philadelphia, Pennsylvania 19109

Re: South Street Seaport v. McCarthy

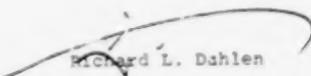
Dear Wayne:

You have inquired as to when the Seaport's petition for certiorari was received in this office.

It is my best recollection that it was actually received on Monday, November 28, which is not unusual in view of the New England observance of Thanksgiving.

As I advised you by telephone, I do not assent to your filing as amicus curiae a brief supporting the Seaport's petition, but I see no practical way to object and in any event have too much respect for your firm to make a big deal out of it.

Yours very truly,



Richard L. Dahlen

RLD:la

cc: Francis X. Byrn, Esquire
Raymond C. Green, Esquire

REC'D DEC 20 1983

EXHIBIT "A"

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

SOUTH STREET SEAPORT MUSEUM,
as Owner of the Bark PEKING,

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**BRIEF AMICI CURIAE OF NATIONAL MARITIME
HISTORICAL SOCIETY AND NATIONAL MARITIME
MUSEUM ASSOCIATION IN SUPPORT OF THE
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INTEREST OF AMICI CURIAE

Amici Curiae, National Maritime Historical Society and National Maritime Museum Association are directly interested in historic ship preservation and submit this Brief Amici Curiae pursuant to United States Supreme Court Rule 36.1 in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit ("Petition") which was filed in this matter by Petitioner, South Street Seaport Museum. Pursuant to United States Supreme Court Rule 36.5, this brief amici curiae sets forth the interest of the amici curiae, the reasons relied on by amici curiae for granting the writ of certiorari, and the conclusion.

I. NATIONAL MARITIME HISTORICAL SOCIETY'S INTEREST

National Maritime Historical Society ("Society") is a 7,500 member nonprofit District of Columbia corporation established in 1963 to support and facilitate the capability of museums, including Petitioner, South Street Seaport Museum, to acquire, restore, preserve and display historic ships. The Society is the largest maritime historical organization in America. The Society helped raise and administer the funds for the purchase of the Wavertree and the Ernestina and for the restoration of the Wavertree. The Wavertree is permanently berthed at the South Street Seaport Museum, and, after restoration, the Ernestina will be permanently berthed at the New Bedford, Massachusetts, maritime museum.

The Society has acquired title in its own name to certain historically important ships, including the last American-registered square-rigged ship in active service, the hulk Kaiulani, and the Vicar of Bray. The Kaiulani was dismantled by scavengers in the Philippines before the Society could obtain the funds to bring her to the United States for restoration. The Vicar of Bray risks the same fate in the Falkland Islands while the Society acquires funds to bring her to the United States for restoration.

To raise money for and publicize the cause of historic ship preservation, the Society publishes "Sea History," a journal of maritime history with a circulation of approximately 25,000, two-thirds of which is paid subscriptions.

The Society also acts as a public spokesman for historic ship preservation in its capacity as the official United States representative to the World Ship Trust, a British-based association of maritime ship historians from Great Britain, the United States, West Germany, France and the Netherlands.

II. NATIONAL MARITIME MUSEUM ASSOCIATION'S INTEREST

National Maritime Museum Association ("Association") is a California nonprofit corporation established in 1951, in part to purchase and restore historic ships for permanent display in San Francisco. Five historic ships are permanently berthed in San Francisco: C.A. Thayer, Wapama, Eureka, Hercules, and Balclutha. Title to these five permanently-berthed museum ships is held by the National Park Service, which operates the National Maritime Museum in San Francisco. The Association also holds title to and raised funds for restoring the U.S.S. Pampanito which will be permanently berthed in San Francisco.

The Association's acquisition and restoration of the Balclutha was one of the first major nonmilitary ship restoration projects in America, and was the genesis of the large public interest in historic ship preservation. The Association purchased the Balclutha in the early 1950's for \$25,000.¹ She was restored during 1954 and 1955 through the combined efforts of trade unions, business and the public in the San Francisco Bay area. Trade union members contributed 150,000 hours of labor at no charge; business contributed over \$100,000 in goods and services; public volunteers added another 50,000 hours of work; and the Balclutha was permanently berthed and opened to the public in late 1955.

1. Title to the Balclutha was recently transferred to the National Park Service.

III. THE DECISION BELOW WILL ADVERSELY AFFECT HISTORIC SHIP PRESERVATION EFFORTS

The question presented here is whether a structure such as the Peking, that is not used and is not intended ever to be used for transport on navigable waters, is a "vessel" within the meaning of Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act ("Longshoremen's Act" or "Act"), 33 U.S.C. §905(b). If it is, an injured employee can circumvent the exclusive compensation remedy provision in Section 905(a) of the Act, 33 U.S.C. §905(a), and sue the "vessel" owner for negligence, even if the owner is his employer.² The court below held that something is a "vessel" under the Act if it has the "residual capacity" for use as a means of transport on water, regardless of its actual use or whether there is even a remote possibility that it would ever be used in such residual capacity. *McCarthy v. The Bark Peking*, 716 F.2d 130, 135 (2d Cir. 1983). If this residual capacity test is not reversed, it will significantly increase the cost of, and therefore adversely affect, historic ship preservation efforts in the United States.

The watchword of historic ship preservation is "cost." To reduce costs, most museum ships, like the Peking, are permanently berthed rather than maintained in running condition. Some fifty-nine museum ships, including the Peking, are now permanently berthed and open to the public at some 113 American maritime museums.³ Because they are permanently

2. This question of what constitutes a "vessel" was left open by *Jones & Laughlin Steel Corp. v. Pfeifer*, ___U.S. ___, 103 S. Ct. 2541 (1983). That decision upheld the right of an injured employee to circumvent Section 905(a)'s exclusive remedy provision and sue a "vessel" owner under Section 905(b) of the Act for negligence, even though the "vessel" owner was also the employer of the injured employee. There the "vessel" was a barge which the employer owned and which, unlike the Peking, was regularly used for transport on navigable waters.

3. A list of these fifty-nine permanently-berthed museum ships and their locations is contained in Appendix A hereto.

berthed and not intended for transport on navigable waters, the costs of maintaining them in a seaworthy condition are avoided. No crew is needed. Constant maintenance of the steering, propulsion and other operating systems is unnecessary. Permanently-berthed museum ships are typically secured to land with chains or steel cable rather than ropes which require much more maintenance. They usually have permanent connections to shoreside utilities and are often grossly overballasted to prevent rolling.⁴ Most of them are not inspected by the Coast Guard. In short, a permanently-berthed museum ship is maintained as a museum exhibit; it is not a seagoing vessel and its "residual capacity" to be a vessel is theoretical at best.

Nevertheless, like the *Peking*, most of the permanently-berthed museum ships are afloat and therefore may have the "residual capacity" to be used as a means of transport on water. By virtue of the decision below, they could then be held to be "vessels" under Section 905(b), thereby permitting injured museum employees to pierce the exclusive remedy provision in Section 905(a) of the Act. The Society, the Association and other permanently-berthed museum ships owners could be liable as "vessel" owners. Moreover, unlike Longshoremen's Act compensation benefits, there is no dollar limit on Section 905(b) awards against vessel owners, so such suits could impose intolerably large costs on maritime museums and other historical ship owners. The cost of restoring and preserving historic ships is so large and the available funds so small that historical ship preservation is already an endangered species. By raising considerably the cost of restoring and preserving historic ships, the decision below threatens total extinction of

4. The *Peking*, for example, contains two million pounds of permanent concrete ballast.

historic ship preservation efforts in the United States.⁵ Accordingly, Amici Curiae, National Maritime Historical Society and National Maritime Museum Association urge the Court to grant a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

REASONS RELIED ON FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER FEDERAL COURTS

The residual capacity test adopted by the Court below squarely conflicts with the test adopted by four other federal courts. Each of those other courts has held that a "vessel" under the Act is something which not only has the residual capacity to be used for transport on navigable waters, but is actually so used or is intended for such use. *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 41 (3d Cir. 1975), cert. denied, 423 U.S. 1054 (1976); *Fleming v. Port Allen Marine Service, Inc.*, 552 F.Supp. 27, 29 (M.D. La. 1982); *Mayfield v. Wall Shipyard, Inc.*, 510 F.Supp. 605, 607 (E.D. La. 1981); *Wendt v. General Dynamics Corp.*, ___ F.Supp. ___, 1979 A.M.C. 2897, 2902 (D.N.J. 1978). Apart from the court below, few other courts have held that the mere capacity for such use is sufficient to make something a Section 905(b) "vessel." See *Duncan v. Dravo Corp.*, 426 F.Supp. 1048 (W.D. Pa. 1977). The Writ should be granted to resolve these conflicting decisions.

In *Griffith v. Wheeling-Pittsburgh Steel Corp.* the Third Circuit ruled that an employee could sue the owner pro hac vice

5. The decision below also poses a significant threat to the beleaguered American shipbuilding industry. Under the "residual capacity" test every new floating hull, whether it is 5% complete or 50% complete, could be a "vessel" for Section 905(b) purposes, and every American shipbuilder could be liable in negligence to its injured employees as a "vessel" owner pro hac vice. See *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3d Cir. 1975), cert. denied, 423 U.S. 1054 (1976) (allowing §905(b) suit against employer as vessel owner pro hac vice).

of a barge. In so ruling, the court held that the definition of "vessel" under the Jones Act, 46 U.S.C. §688, was also the definition of a vessel under Section 905(b). 521 F.2d at 41. See *Wendt v. General Dynamics Corp.*, 1979 A.M.C. at 2900. The Jones Act requires a "vessel" to be in or intended for navigation, not just be capable of navigation. See 46 U.S.C. §713; *Hicks v. Ocean Drilling & Exploration Co.*, 512 F.2d 817, 823 (5th Cir. 1975), cert. denied, 423 U.S. 1050 (1976). Accordingly, *Griffith's* holding squarely conflicts with the test adopted by the court below.

In *Mayfield v. Wall Shipyard, Inc.* the court held that a shipyard's steel pontoon float, which had never traveled outside of the shipyard and was never moved with people on it, was not a Section 905(b) "vessel." Far from the "residual capacity" test used below, the court ruled that "*the two most important factors in determining whether a structure is a [Section 905(b)] vessel are the purpose for which the craft is constructed and the business in which it is engaged.*" 510 F. Supp. at 607 (emphasis added).

Wendt v. General Dynamics Corp. involved the question of whether a navigation buoy hull was a Section 905(b) vessel so that the owner, when sued, was prohibited from seeking indemnification from the plaintiff's employer. The *Wendt* court held that it was a vessel, noting that it was intended to carry some people and that while it was at sea for periods up to four years' duration, it was boarded by the Coast Guard for inspection and maintenance purposes, thereby exposing Coast Guard personnel to "the risks and hazards of sea." 1979 A.M.C. at 2902. As the court explained, "*the crucial distinction in determining whether or not an object is a vessel is whether it is intended to, and does in fact, carry people upon it in the normal course of events.*" 1979 A.M.C. at 2902 (emphasis added).

Similarly, in *Fleming v. Port Allen Marine Service, Inc.*, the court held that a work flat which was used solely to provide an auxiliary work surface for use in the employer's ship repair activities and never left the shipyard was not a Section 905(b)

vessel because it was not designed to serve in navigation even though it had the capability to do so. 552 F.Supp. at 29 (*citing Cook v. Belden Concrete Products, Inc.*, 472 F.2d 999 (5th cir.), *cert. denied*, 414 U.S. 868 (1973) (a structure is not a vessel for Jones Act purposes unless it is actually engaged in navigation)).

Because the decision below conflicts with the decisions of at least four other federal courts, a Writ of Certiorari should be granted to resolve the conflict.

II. THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONTRAVENES THE PURPOSE OF THE LONGSHOREMEN'S ACT GENERALLY AND OF SECTION 905(b) PARTICULARLY

A. The Decision Below Contravenes the Purpose of the Longshoremen's Act

This case arises under Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act. Whatever else that Act may be, it is first and foremost a workers' compensation statute. At its heart lies a compromise between employees and employers which both ultimately supported after several years of hard Congressional bargaining.⁶ The compromise pro-

6. Representative Graham, who was chairman of the House Judiciary Committee which held extensive hearings on the bill, noted that "this legislation has been before the House, through its committees, for several years. It has been considered thoroughly and in every particular. We have had the benefit of expert advice and have examined all the laws existing in other states on this subject." 68 Cong. Rec. H5410 (March 2, 1927). Although not entirely satisfactory to employers or employees, both ultimately supported the Act and urged Congress to adopt it:

I wish to say finally to the House that this bill which is now presented, while it is not entirely satisfactory to each side, both sides have united in asking to have it passed. The representatives of the longshoremen and representatives of the employers have both united to ask for the adoption of this measure. Of course, when you are legislating and there are conflicting interests you can not expect to satisfy both of them, but this bill does measurably satisfy both sides, and they ask you to pass it as it is.

Id. at H5414 (remarks of Rep. Graham).

vides that longshore employers will promptly provide medical care and disability payments to injured employees without a showing of fault, but that such care and payments will be the employees' exclusive remedy against their employers. These terms of the compromise are clear from the earliest Report on the Act:

The Senate bill as reported by the committee will provide the benefits of workmen's compensation to practically all maritime workers within the admiralty jurisdiction. Workmen's compensation has come to be universally recognized as a necessity in the interest of social justice between employer and employee. It is the modern substitute for the old common-law remedy afforded through actions at law for damages, and promptly affords relief to the injured employee by furnishing medical attendance and supplies immediately upon the occurrence of the injury or as soon thereafter as possible and compensation during the period of his illness or inability to pursue his usual employment, and in case of death, financial assistance to his dependents, without the delay and expense which an action at law entails.

H. R. Rep. No. 1767, 69th Cong., 2d Sess. 19-20 (January 14, 1927). The exclusive remedy was provided in Section 5 of the Act, P.L. 69-803, c. 509, §5 (March 4, 1927), and is unchanged in pertinent part:

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, . . .

33 U.S.C. §905(a).⁷ The exclusive remedy is absolute. It "completely obliterates the rights at common, civil or maritime law

7. Medical care is provided by Section 907 of the Act, 33 U.S.C. §907, and disability compensation by Section 908, 33 U.S.C. §908.

against Employer and fellow employee. Congress in its unlimited power has determined that the relationship gives rise only to compensation liabilities. The nature of the obligation is that there is no — the word is *no* — obligation." *Nations v. Morris*, 483 F.2d 577, 587-88 (5th Cir.), *cert. denied*, 414 U.S. 1071 (1973) (footnote omitted and emphasis in original).

Because the prompt payment/exclusive remedy compromise lies at the heart of the Longshoremen's Act, fidelity to Congress' purpose demands that any exception to the exclusive remedy provision be narrowly construed. *See Dickerson v. New Banner Institute, Inc.*, ____ U.S. ___, 103 S. Ct. 986, 994 (1983) (the words of a statute are to be interpreted in light of the purposes Congress sought to serve). Such fidelity is especially appropriate where, as here, the statute is a compromise one that was ultimately supported by "both friend and foe of the legislation at the time of its adoption." *See First National Bank v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966). The commentators also caution that the meaning of "vessel" must be measured against a particular statute's purpose and that a structure may not be a "vessel" for purposes of every admiralty statute.⁸ The "residual capacity" test adopted by the court below flies in the face of these accepted rules of statutory construction and violates the Congressional compromise which lies at the Act's heart. Its broad and unwarranted definition of "vessel" enables employees to circumvent the Act's exclusive remedy provision and creates a cause of action where none was intended. Therefore, a Writ should be granted.

8. "The word 'vessel' has a variable meaning in law applicable to the particular statute to which the legislature applied it." 1 Norris, *The Law of Maritime Personal Injuries* §12 at 23 (3d ed. 1975) (footnote omitted). "Like 'seaman,' the word 'vessel' is a flexible one used in conjunction with the legislative intent of the particular statute involved." *Id.* n.56. *Accord* 1 Benedict on Admiralty §161 at 10-2 (7th ed. 1983) ("It may happen that a structure may be a vessel or other appropriate maritime object for the purpose of the application of one rule of admiralty law and not for another; . . .").

B. The Decision Below Contravenes Section 905(b)'s Purpose

Section 905(b) permits an injured employee covered by the Act to sue a "vessel" owner for negligence. In *Jones & Laughlin Steel Corp. v. Pfeifer*, this Court held that Section 905(b) allows an injured employee to bring a separate negligence action against his employer in the employer's capacity as vessel owner. There, of course, the "vessel" was really a vessel — a coal barge. In reaching its holding in *Jones & Laughlin* the Court looked to "the history of the Act." 103 S. Ct. at 2547. That history was that a longshoreman employed directly by the vessel could sue the vessel for unseaworthiness. See *Reed v. The Yaka*, 373 U.S. 410 (1963). Although the 1972 amendments changed an unseaworthiness cause of action to a negligence claim, this Court held in *Jones & Laughlin* that "Congress clearly intended to preserve the rights of longshoremen employed by the vessel" to maintain an action against their employer as vessel owner. 103 S. Ct. at 2547 (emphasis added). Accordingly, to determine what constitutes a "vessel" under Section 905(b), one must look to history to see what a longshoreman's rights were under the unseaworthiness doctrine.

The sea presents unique hazards and perils to a ship in navigation which are not presented to a building on land, and persons aboard a ship must maintain a consistently higher degree of readiness in order to resist those perils than must persons in a building. In response to those unique perils, admiralty has historically recognized that a vessel owes to its crew a warranty of seaworthiness. See generally Gilmore & Black, *The Law of Admiralty* 383-404 (2d ed. 1975). *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), extended this warranty of seaworthiness to longshoremen injured on a ship in navigation on the rationale that they were doing seamen's work and, like seamen, were exposed to the hazards of the sea. 328 U.S. at 93-94. For the same reasons, longshoremen were subsequently allowed to sue the vessel owner for breach of the seaworthiness warranty, even though the vessel owner was also their em-

ployer. *Reed v. The Yaka*, 373 U.S. at 415 (referring to the "traditional, absolute, and nondelegable obligation of seaworthiness"); *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 731 (1967).

But where a vessel was withdrawn from navigation and no longer intended to subject those aboard to the perils of the sea, it was held not to warrant its seaworthiness, and an injured longshoreman did not have an unseaworthiness action against the vessel's owner. *Roper v. United States*, 368 U.S. 20 (1961); *West v. United States*, 361 U.S. 118 (1959). For the same reasons, an employee's *Reed v. The Yaka* unseaworthiness action against his employer was held not to lie where the employer's vessel was not in navigation. E.g., *Jefferson v. S.S. Bonny Tide*, 281 F.Supp. 884 (E.D. La. 1968) (new vessel under construction). Thus, prior to the 1972 amendments, an injured employee could sue his employer as vessel owner for unseaworthiness, and that claim inherently required that the vessel be used or be intended for use in navigation.

As this Court held in *Jones & Laughlin*, the 1972 amendments preserved the longshoreman's preexisting right to sue a vessel but changed the theory from unseaworthiness to negligence. Accordingly, where, as in *Jones & Laughlin*, the employee was injured while aboard a craft actually used for transport on navigable waters or intended to be so used, the employee can make a claim against the vessel owner. But here the Peking is not actually used or intended ever to be used for transport on navigable waters. In such circumstances the employee would not historically have had an unseaworthiness claim, and there therefore was nothing for the 1972 amendments to preserve. To nevertheless grant the employee a cause of action against his employer is inconsistent with Section 905(b)'s history. It also is contrary to the Act's prompt payment/exclusive remedy compromise because it interprets Section 905(b) to create a cause of action where none existed before. In short, although a historic ship such as the Peking has masts and sails and lines and anchors, the mere presence of these parapher-

nalia do not pose unique perils to employees. The unique perils which gave rise to the unseaworthiness claim arise only when the craft is intended to be used or is actually used for transport on navigable waters. That is the test of what is a vessel under Section 905(b), and the lower court ignored history, Congress' intent and common sense in adopting the "residual capacity" test.

CONCLUSION

For the foregoing reasons, this Court should grant a Writ of Certiorari to the United States Court of Appeals for the Second Circuit and reverse the decision in *McCarthy v. The Bark Peking*, 716 F.2d 130 (2d Cir. 1983).

Respectfully submitted,

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**APPENDIX A:
PERMANENTLY-BERTHED
MUSEUM SHIPS IN THE UNITED
STATES**

San Francisco, California

C. A. THAYER
WAPAMA, steam schooner
EUREKA, ferry boat
HERCULES, tug
U.S.S. PAMANITO, submarine
BALCLUTHA

**South Street Seaport Museum
New York, New York**

PEKING
WAVERTREE
LETTIE G. HOWARD, fishing schooner
AMBROSE, light ship

**Mystic Seaport
Mystic, Connecticut**

L. A. DUNTON, Grand Banks fishing schooner
CHARLES W. MORGAN, whaler
JOSEPH CONRAD, sail training ship

**Northwest Seaport
Seattle, Washington**

WAWONA (awaiting restoration)
SAN MATEO, ferry boat
RELIEF, light ship

San Diego, California

STAR OF INDIA, clipper
BERKELEY, ferry boat

Baltimore, Maryland

U.S.S. CONSTELLATION, frigate
FIVE FATHOM, light ship
U.S.S. TORSK, submarine

Philadelphia, Pennsylvania

U.S.S. OLYMPIA, battleship
U.S.S. BECUNA, submarine

Cleveland, Ohio

U.S.S. COD, submarine

Honolulu, Hawaii

FALLS OF CLYDE

Galveston, Texas

ELISSA
U.S.S. CAVALLA, submarine
U.S.S. STEWARD, destroyer

Menominee, Michigan

ALVIN CLARK

Sault Ste. Marie, Michigan

VALLEY CAMP, lake freighter

Fall River, Massachusetts

U.S.S. MASSACHUSETTS, battleship
U.S.S. JOSEPH KENNEDY, destroyer
U.S.S. LIONFISH, submarine

Buffalo, New York

U.S.S. LITTLE ROCK, light cruiser
U.S.S. THE SULLIVANS, destroyer

Wilmington, North Carolina

U.S.S. NORTH CAROLINA, battleship

Mobile, Alabama

U.S.S. ALABAMA, battleship

U.S.S. DRUM, submarine

Charleston, South Carolina

U.S.S. YORKTOWN, aircraft carrier

San Jacinto, Texas

U.S.S. TEXAS, battleship

Douglas, Michigan

KEEWATIN

Superior, Wisconsin

METEOR, whaleback lake boat

Astoria, Oregon

COLUMBIA, light ship

Groton, Connecticut

U.S.S. CROAKER, submarine

Marietta, Ohio

W. P. SNYDER, stern-wheeler

Shelburne, Vermont

TICONDEROGA, side-wheel steamer

Portsmouth, Virginia

PORPSMOUTH, light ship

Booth Bay Harbor, Maine

SHERMAN ZWICKER, fishing schooner

Lewes, Delaware

OVERFALLS, light ship

Chicago, Illinois

U-505, submarine (displayed on land)

U.S.S. SILVERSIDE, submarine

Piney Point, Maryland (maintained by the
Seafarers International Union)

DOROTHY PARSONS, two-masted oystering craft

RELIEF, light ship

St. Michaels, Maryland

EDNA E. LOCKWOOD, two-masted oystering
craft

Nantucket, Massachusetts

NANTUCKET, light ship

New Bedford, Massachusetts

RELIEF, light ship

Hackensack, New Jersey

U.S.S. LING, submarine

Muskogee, Oklahoma

U.S.S. BATFISH, submarine

Manitowoc, Wisconsin

U.S.S. COBIA, submarine